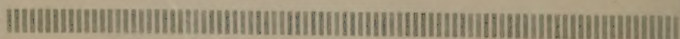


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AN INTRODUCTION *to the* STUDY
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AN INTRODUCTION *to the* STUDY *of the* AMERICAN CONSTITUTION

*—An Outline of
the Formation and Development of the
American Constitutional System and
of the Ideals upon Which it is Based*

By

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TO
MARTIN J. WADE
AND
BENJAMIN F. BLEDSOE
JUDGES OF THE UNITED STATES DISTRICT COURT
PIONEERS IN THE MOVEMENT
TO PUT THE CONSTITUTION IN THE HOMES AND SCHOOLS
OF AMERICA

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P R E F A C E

Chief Justice Marshall, in his most celebrated decision, said, "We must never forget that it is a constitution we are expounding." No principle of the American government and its institutions is more fundamental than this, and any one who aims to discuss and explain the Constitution of the United States should keep it steadily in view.

The people of the United States have prescribed, by means of a written constitution, rules for the exercise of sovereign power. The instrument defines the rights and duties of the government, distributes its powers, prescribes the mode of their exercise, and limits them in behalf of civil and political liberty. It sets up a framework of government; it lays down main principles of fundamental law which are meant to be of general and permanent application. It represents the mature and reasoned will of the sovereign authority in contrast with the evanescent will of majorities.

The Constitution is not approached as an object of political witchcraft which works through some mystical charm of its own. It is a skeleton which supports living organisms. It gives form and substance to the organism, but the life is elsewhere. An instrument of law, no matter how fundamental, is cold and lifeless without the contact of human personalities. Ours is a government of laws, but a government by men.

Nor is the Constitution approached as an instrument which has outlived its usefulness and which has seen its day. No one should be blind to the defects of our Constitution or of our

system of government. While the value of constitutional criticism should be recognized, no one can deny to the document its position of primacy among the constitutions of government of the world, for it is "the most wonderful work ever struck off at a given moment by the hand and purpose of man."

How properly to deal with growing criticism of the Constitution is a problem which must be wisely but surely attacked. It has two aspects. The first has to do with its effect upon our institutions today. Those who would tear the Constitution to shreds are generally the first who seek to cover themselves with its protective measures when called to account for their conduct. Infractions of and vicious assaults upon the Constitution should be punished. The best answer to direct action, however, is the preservation, rather than the suspension of constitutional guarantees, and should be dealt with as it interferes with these guarantees. Individuals and organizations whose purpose is anarchy and destruction of law receive only aid and comfort when we resist their efforts by making ourselves a party to the act of destruction. However wrong they may be, and as much as we may detest their motives, it is better that justice be done, rather than denied. The Constitution is the stronger in the end.

The second aspect has to do with the effect of this criticism on the youth of the land, especially students of the form and ideals of our government. The problem is not how this criticism can be removed, but how it may be made intelligent, constructive, helpful, and how it can be made to serve some useful purpose. Moreover, it is submitted that the time is at hand for some constitutional appreciation to displace so much constitutional abuse. To meet this problem, many of the state legislatures, inspired by the American Bar Association and the associations of the states concerned, have determined that our young people shall *know the Constitution*—not merely something

about the Constitution. This can have only one meaning. Students must study the fundamental instrument, and not merely about it.

The purpose of this book is to furnish the student and the general reader with an introductory study of the American Constitution. It embraces the formation of our constitutional system from the time of English and colonial origins to its framing and adoption; and its evolution from the time of its first trial to the present day. The material is presented under appropriate headings for the convenience of the student and reader, but the plan of a continuous treatment of the subject is maintained throughout.

Reading lists are appended to each chapter as a guide for further study and investigation. Constitutional documents of first importance are included in the appendix, together with interesting information about men and institutions which have helped to mould our constitutional system. For those who prefer an emphasis on institutions and ideals rather than on the Constitution itself, a syllabus dealing with this phase of the subject has been included.

Controversial questions have been dealt with. It has been the author's purpose to discuss and not to decide them. I have tried faithfully to interpret the decisions of the Supreme Court and the deliberate judgment of the American people on the Constitution for those who seek light on the subject. Since the Constitution is its own best justification, its text and that of the California law requiring its study in the schools appear before the subject-matter.

I am indebted especially to Dean M. L. Darsie and Professor Marshall F. McComb, colleagues in the University of California, Southern Branch, whose counsel and cooperation have made instruction in the Constitution here an inspiration and joy. I

am glad to express my gratitude to Professor William H. George of the University of Washington for inspiring counsel in regard to this study, and for his sustained interest in my every undertaking. My acknowledgments are also due Professor W. B. Munro of Harvard University, and Chief Justice Louis W. Myers, of the Supreme Court of California, whose interest in sound instruction on the fundamentals of the Constitution has been a light unto my pathway, and a lamp unto my feet.

CHARLES E. MARTIN.

*University of California,
Los Angeles, January 1, 1925.*

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INTRODUCTION

The Legislature of the State of California, in conformity with the action taken by approximately half of the other state legislatures of the United States of America, has adopted an act providing that "there shall be given regular courses of instruction in the Constitution of the United States" in all schools. These acts have given rise to two questions. First: Why should a state legislature require that the Constitution of the United States be taught in the schools? Second: What should a course of instruction in the Constitution of the United States designed to meet this legislative requirement embrace?

As to the first question, the answer is apparent. During the past few years, the government of the United States of America has been subjected to severe criticism from various quarters. This criticism has generally resulted in an attack either direct or indirect upon the Constitution. At the outset, such criticism was considered of little importance and did not receive much attention in view of the fact that it came in the main from those seeking notoriety or from those advocating a change, irrespective of the merit of such change, in the hope that if a change took place, they might in some way profit by it. Recently, however, criticism of the Constitution has become popular and has been indulged in by those of high standing in the country because of their intellectual attainments. In some instances, the critics include among their number University professors and others in similar positions from whom the layman is entitled to receive accurate and authentic information. Comments coming from such sources demand consideration and the result has been that many of the leading

minds in our communities have undertaken a study of the problem to determine the source and basis of the attacks upon the Constitution. A study of this question has led to the conclusion that there are two sources from which the various attacks upon the Constitution of the United States of America have been launched.

There is the small minority who are familiar with the history of the Constitution, its aims and ideals, who have attacked it at various times, and who now attack it in the belief that they will thus further their own political aim or that some Utopian scheme of government may be adopted which will usher in the millennium.

There are the other critics, by far the great majority, who have attacked the Constitution honestly but ignorantly. They believe that they have some panacea to offer for the ills of government, but they are not familiar with history and the experiments in government which have been made and which have failed; neither are they conversant with the conditions leading up to the framing and adoption of the Constitution, or of the way in which the government of the United States of America has functioned and developed since the adoption of the Constitution.

As to the first class which, fortunately, is a noisy but pitiful minority, their effectiveness is in direct proportion to the amount of attention which the public sees fit to give them.

The second class is in an entirely different situation. It has been found that even among our University graduates there are comparatively few who are really familiar with the events which resulted in the adoption of the Constitution of the United States, with the machinery of government which this document created, with the difficulties encountered by our forefathers, and with the ideals they hoped could be attained. In an endeavor to enlighten this

second group so that criticism of the Constitution of the United States of America should be based on knowledge, be constructive, and be of value rather than based on ignorance and misinformation furnished by those desiring the overthrow of our government, the state legislatures have required that instruction in the Constitution of the United States be given in the schools.

Upon the second question concerning what a course of instruction in the Constitution of the United States should embrace, there has been considerable diversity of opinion among those charged with the task of determining the content of such a course. Some few instructors have taken the position that the legislature by undertaking to prescribe a course in the school curriculum was infringing upon the freedom heretofore enjoyed by educational institutions of determining the subjects of instruction to be offered. The great majority of educators, however, have fallen in with the spirit of the legislation, and have made an honest endeavor to carry out the legislative intent.

Among those who have endeavored to cooperate with the legislature, however, there has been considerable diversity of opinion as to exactly what was the "legislative intent." In endeavoring to arrive at the legislative intent, it is necessary to consider the attacks that have been made upon the Constitution, and the merit, if any, in the changes which have been suggested. It was undoubtedly to counteract these attacks that the various legislatures acted. This, in turn, involves a consideration of the circumstances which led to the formation of the Articles of Confederation and later the Constitution of the United States of America, together with an understanding of the purposes and ideals of the framers of the Constitution, and a consideration of whether these purposes and ideals have been attained.

The attack now being launched with greatest vigor is

directed against the power of the Supreme Court of the United States to declare unconstitutional acts of Congress by decisions of a bare majority of the court. Much misinformation and many misstatements have been published and circulated regarding this power. A recent publication even went so far as to state that the United States Supreme Court had said that an amendment of the Constitution to protect our children from child labor exploiters is not legal, a statement which, as anyone who is even slightly familiar with the decisions of the Supreme Court knows, is utterly erroneous.

The framers of the Constitution did not conceive any new form of government. They were content to accept the theories of government which the experience of ages had demonstrated to be best adapted for the welfare and happiness of men when associated in large numbers. They recognized that the form of government which nearest approached this ideal was one in which the sovereign power was divided into its three constituent parts: legislative, executive, and judicial, and in which each branch functioned independent in its own sphere, cooperating with the other coordinate powers toward a common end—the welfare of the governed. In addition, they recognized that the great weakness of all previous attempts to establish such a government based upon a tripartite division of the sovereign power was that one or the other of the constituent parts had always theretofore obtained supremacy and usurped the functions of the other divisions. In order to overcome this defect in the future, they conceived the idea that the elements of the sovereign power might be made to act and react upon one another in such a manner that each would be restrained within its prescribed field. With this end in view, limitations were placed upon the powers of the executive, legislative, and judicial branches of the

government. Even so, the framers of the Constitution were apprehensive that the legislative branch of the government, because of its direct connection with the people might, sooner or later, usurp the powers of the other two branches. This is evidenced by the following statement in the *Federalist*:

"In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."

Even with this warning, individuals high in the counsels of the government have declared that the Constitution should be amended so as to deprive the Supreme Court of the United States of America of the authority to declare unconstitutional acts of Congress and have severely criticised justices of the Supreme Court of the United States who, abiding by their oath of office, have declared that the Constitution of the United States is the supreme law of the land and that any act, even though it be an act of Congress, which is contrary thereto, is null and void. One of the most important questions before the American people today is whether the power of the Supreme Court is to be restricted by an amendment to the Constitution of the

United States. Whether such an amendment should be adopted is dependent upon the answer given to the query, "Has the exercise of this power by the Supreme Court been for the best interest of the people of the United States?" The answer to the question is to be found in a perusal of the decisions of the Supreme Court of the United States holding unconstitutional acts of Congress and in a consideration of the effect of these decisions upon our national progress. Any person who takes the trouble to read these decisions will find that, in the main, the decisions have simply confined the various branches of the sovereign power within their sphere as outlined by the Constitution of the United States, and that in numerous cases, the Supreme Court has refused to accept powers with which Congress was endeavoring to clothe it, for the reason that there was no authority in the Constitution for the assumption by it of the functions proposed.

How to put these facts and others before the student has been one of the most important of the numerous problems which have been encountered by those who have endeavored to ascertain the proper instruction to be given through a course in the Constitution of the United States.

There have been writers who have discussed the Constitution of the United States from an economic point of view. Others have discussed the Constitution from a purely historical standpoint. Dr. Martin has looked at the Constitution in the light of the facts and endeavored to place in the hands of the student of the Constitution a book which would give the essential facts leading up to the framing of the Constitution, the conditions under which it was framed, the ideals of the framers of the Constitution, and the interpretation which has been placed upon the Constitution since its adoption. Dr. Martin, in his present book, has painstakingly accomplished this result. At the same time he has

carefully avoided drawing inferences and deductions from the facts which have taken place, and has refrained from endeavoring to fit the facts into some preconceived theory of his own. On the contrary, he has rigorously confined himself to the rule which he adopted when he first undertook the preparation of this book: that of giving the facts, firm in the belief that any person knowing the facts surrounding the framing, the adoption, and the interpretation of the Constitution, must recognize that the framers of the Constitution not only selected the best form of government for themselves and for posterity, but also achieved the end which they desired for the preservation of that government by providing an effective method for keeping the executive, legislative and judicial branches of government each in its own proper sphere.

MARSHALL F. McCOMB.

*Los Angeles, California,
January 1, 1925.*

The CONSTITUTION *of the* UNITED STATES¹

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after

¹Text of Constitution and Notes are taken from *The Constitution of the United States of America* (Annotated), compiled by George Gordon Payne.

the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings,

punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall reutrn it, with his Objections to that IHouse in which it shall have originated, who shall enter the

Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal; and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Ports, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin

Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and

certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for

the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another

State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not Committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the

Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names.

GO WASHINGTON—Presidt
and deputy from Virginia.

Attest WILLIAM JACKSON Secretary

NEW HAMPSHIRE	{ JOHN LANGDON NICHOLAS GILMAN
MASSACHUSETTS	{ NATHANIEL GORHAM RUFUS KING
CONNECTICUT	{ WM. SAM'L. JOHNSON ROGER SHERMAN
NEW YORK	{ ALEXANDER HAMILTON
NEW JERSEY	{ WIL: LIVINGSTON DAVID BREARLEY WM. PATERSON JONA: DAYTON
PENNSYLVANIA	{ B FRANKLIN THOMAS MIFFLIN ROBT. MORRIS GEO. CLYMER THOS. FITZSIMONS JARED INGERSOLL JAMES WILSON GOUV MORRIS

DELAWARE	{ GEO: READ GUNNING BEDFORD jun JOHN DICKINSON RICHARD BASSETT JACO: BROOM
MARYLAND	{ JAMES McHENRY DAN OF ST. THOS. JENIFER DANL. CARROLL
VIRGINIA	{ JOHN BLAIR— JAMES MADISON JR.
NORTH CAROLINA	{ WM. BLOUNT RICHD. DOBBS SPAIGHT HU WILLIAMSON
SOUTH CAROLINA	{ J. RUTLEDGE CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER
GEORGIA	{ WILLIAM FEW ABR BALDWIN

In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.
Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this

Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.

GO. WASHINGTON Presidt.

W. JACKSON Secretary.

AMENDMENTS *to* the CONSTITUTION¹

AMENDMENT 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 2.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT 3.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT 4.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the Legislatures of Connecticut, Georgia, and Massachusetts ratified them.

AMENDMENT 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 7.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT 8.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT 11.¹

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT 12.²

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the

¹The eleventh amendment was submitted to the legislatures of the several States by a resolution of Congress passed on the 5th of March, 1794, at the first session of the Third Congress; and on the 8th of January, 1798, at the second session of the Fifth Congress, it was declared by the President, in a message to the two Houses of Congress, to have been adopted by the legislatures of three-fourths of the States, there being at that time sixteen States in the Union.

²The twelfth amendment was submitted to the legislatures of the several States, there being then seventeen States, by a resolution of Congress passed on the 12th of December, 1803, at the first session of the Eighth Congress, and was ratified by the legislatures of three-fourths of the States in 1804, according to a proclamation of the Secretary of State dated the 25th of September, 1804.

list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT 13.¹

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have

¹The thirteenth amendment was submitted to the legislatures of the several States, there being then 36 States, by a resolution of Congress passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress, and was ratified, according to a proclamation of the Secretary of State dated Dec. 18, 1865, by the legislatures of the following States: Illinois, Feb. 1, 1865; Rhode Island, Feb. 2, 1865; Michigan, Feb. 2, 1865; Maryland, Feb. 3, 1865; New York, Feb. 3, 1865; West Virginia, Feb. 3, 1865; Maine, Feb. 7, 1865; Kansas, Feb. 7, 1865; Massachusetts, Feb. 8, 1865; Pennsylvania, Feb. 8, 1865; Virginia, Feb. 9, 1865; Ohio, Feb. 10, 1865; Missouri, Feb. 10, 1865; Indiana, Feb. 16, 1865; Nevada, Feb. 16, 1865; Louisiana, Feb. 17, 1865; Minnesota, Feb. 23, 1865; Wisconsin, Mar. 1, 1865; Vermont, Mar. 9, 1865; Tennessee, Apr. 7, 1865; Arkansas, Apr. 20, 1865; Connecticut, May 5, 1865; New Hampshire, July 1, 1865; South Carolina, Nov. 13, 1865; Alabama, Dec. 2, 1865; North Carolina, Dec. 4, 1865; Georgia, Dec. 9, 1865.

The following States ratified this amendment, subsequent to the date of the proclamation of the Secretary of State, as follows: Oregon, Dec. 11, 1865; California, Dec. 20, 1865; Florida, Dec. 28, 1865; New Jersey, Jan. 23, 1866; Iowa, Jan. 24, 1866; Texas, Feb. 18, 1870.

been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT 14.¹

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature

¹The fourteenth amendment was submitted to the legislatures of the several States, there being then 37 States, by a resolution of Congress passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress, and was ratified, according to a proclamation of the Secretary of State dated July 28, 1868, by the legislatures of the following States: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866 (withdrew her consent to the ratification in April, 1868); Oregon, Sept. 19, 1866 (withdrew her consent to the ratification Oct. 15, 1868); Vermont, Nov. 9, 1866; New York, Jan. 10, 1867; Ohio, Jan. 11, 1867 (withdrew her consent to the ratification in January, 1868); Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Kansas, Jan. 18, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Missouri, Jan. 26, 1867; Indiana, Jan. 29, 1867; Minnesota, Feb. 1, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 13, 1867; Pennsylvania, Feb. 13, 1867; Michigan, Feb. 15, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Apr. 3, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868.

The State of Virginia ratified this amendment on the 8th of October, 1869, subsequent to the date of the proclamation of the Secretary of State, having theretofore rejected it.

North Carolina, South Carolina, and Georgia had rejected the amendment prior to the dates of ratification noted.

The States of Delaware, Maryland, Kentucky, and Texas rejected this amendment.

thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT 15.¹

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or

¹The fifteenth amendment was submitted to the legislatures of the several States, there being then 37 States, by a resolution of Congress passed on the 27th of February, 1869, at the first session of the Forty-first Congress; and was ratified,

by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT 16.¹

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT 17.²

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six

according to a proclamation of the Secretary of State dated Mar. 30, 1870, by the legislatures of the following States: Nevada, Mar. 1, 1869; West Virginia, Mar. 3, 1869; North Carolina, Mar. 5, 1869; Louisiana, Mar. 5, 1869; Illinois, Mar. 5, 1869; Michigan, Mar. 8, 1869; Wisconsin, Mar. 9, 1869; Massachusetts, Mar. 12, 1869; Maine, Mar. 12, 1869; South Carolina, Mar. 16, 1869; Pennsylvania, Mar. 26, 1869; Arkansas, Mar. 30, 1869; New York, Apr. 14, 1869 (withdrew her consent to the ratification Jan. 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; New Hampshire, July 7, 1869; Virginia, Oct. 8, 1869; Vermont, Oct. 21, 1869; Alabama, Nov. 24, 1869; Missouri, Jan. 10, 1870; Mississippi, Jan. 17, 1870; Rhode Island, Jan. 18, 1870; Kansas, Jan. 19, 1870; Ohio, Jan. 27, 1870 (Ohio had previously rejected the amendment May 4, 1869); Georgia, Feb. 2, 1870; Iowa, Feb. 3, 1870; Nebraska, Feb. 17, 1870; Texas, Feb. 18, 1870; Minnesota, Feb. 19, 1870.

The State of New Jersey ratified this amendment on the 21st of February, 1871, subsequent to the date of the proclamation of the Secretary of State (New Jersey had previously rejected the amendment).

The States of California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected this amendment.

¹The sixteenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a resolution of Congress passed on July 12, 1909, at the first session of the Sixty-first Congress, and was ratified according to a proclamation of the Secretary of State dated February 25, 1913, by the legislatures of the following States: Alabama, Aug. 17, 1909; Kentucky, Feb. 8, 1910; South Carolina, Feb. 23, 1910; Illinois, Mar. 1, 1910; Mississippi, Mar. 11, 1910; Oklahoma, Mar. 14, 1910; Maryland, Apr. 8, 1910; Georgia, Aug. 3, 1910; Texas, Aug. 17, 1910; Ohio, Jan. 19, 1911; Idaho, Jan. 20, 1911; Oregon, Jan. 23, 1911; Washington, Jan. 26, 1911; California, Jan. 31, 1911; Montana, Jan. 31, 1911; Indiana, Feb. 6, 1911; Nevada, Feb. 8, 1911; Nebraska, Feb. 11, 1911; North Carolina, Feb. 11, 1911; Colorado, Feb. 20, 1911; North Dakota, Feb. 21, 1911; Michigan, Feb. 23, 1911; Iowa, Feb. 27, 1911; Kansas, Mar. 6, 1911; Missouri, Mar. 16, 1911; Maine, Mar. 31, 1911; Tennessee, Apr. 11, 1911; Arkansas, Apr. 22, 1911; Wisconsin, May 26, 1911; New York, July 12, 1911; South Dakota, Feb. 3, 1912; Arizona, Apr. 9, 1912; Minnesota, June 12, 1912; Louisiana, July 1, 1912; Delaware, Feb. 3, 1913; Wyoming, Feb. 3, 1913; New Jersey, Feb. 5, 1913; New Mexico, Feb. 5, 1913.

The States of Connecticut, Rhode Island, and Utah rejected this amendment.

The following States ratified this amendment subsequent to date of the proclamation of the Secretary of State, as follows: Vermont, Massachusetts, New Hampshire, and West Virginia.

²The seventeenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a resolution of Congress passed on 16th day

years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT 18.¹

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

of May, 1912, at the second session of the Sixty-second Congress, and was ratified, according to a proclamation of the Secretary of State dated May 31, 1913, by the legislatures of the following States: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, Jan. 15, 1913; Kansas, Jan. 17, 1913; Oregon, Jan. 23, 1913; North Carolina, Jan. 25, 1913; California, Jan. 28, 1913; Michigan, Jan. 28, 1913; Idaho, Jan. 31, 1913; West Virginia, Feb. 4, 1913; Nebraska, Feb. 5, 1913; Iowa, Feb. 6, 1913; Montana, Feb. 7, 1913; Texas, Feb. 7, 1913; Washington, Feb. 7, 1913; Wyoming, Feb. 11, 1913; Colorado, Feb. 13, 1913; Illinois, Feb. 13, 1913; North Dakota, Feb. 18, 1913; Nevada, Feb. 19, 1913; Vermont, Feb. 19, 1913; Maine, Feb. 20, 1913; New Hampshire, Feb. 21, 1913; Oklahoma, Feb. 24, 1913; Ohio, Feb. 25, 1913; South Dakota, Feb. 27, 1913; Indiana, Mar. 6, 1913; Missouri, Mar. 7, 1913; New Mexico, Mar. 15, 1913; New Jersey, Mar. 18, 1913; Tennessee, Apr. 1, 1913; Arkansas, Apr. 14, 1913; Connecticut, Apr. 15, 1913; Pennsylvania, Apr. 15, 1913; Wisconsin, May 9, 1913.

¹The eighteenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a Resolution of Congress passed on 17th day of December, 1917, at the second session of the Sixty-fifth Congress, and was ratified, according to a proclamation of the Acting Secretary of State dated Jan. 29, 1919, by the legislatures of the following States: Mississippi, Jan. 8, 1918; Virginia, Jan. 11, 1918; Kentucky, Jan. 16, 1918; North Dakota, Jan. 28, 1918; South Carolina, Feb. 12, 1918; Montana, Feb. 20, 1918; Texas, Mar. 4, 1918; Maryland, Mar. 12, 1918; South Dakota, Mar. 22, 1918; Delaware, Mar. 26, 1918; Massachusetts, Apr. 2, 1918; Arizona, May 23, 1918; Georgia, July 2, 1918; Louisiana, Aug. 9, 1918; Florida, Dec. 3, 1918; Michigan, Jan. 2, 1919; Oklahoma, Jan. 7, 1919; Ohio, Jan. 7, 1919; Idaho, Jan. 8, 1919; Maine, Jan. 8, 1919;

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT 19.¹

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

THE CALIFORNIA LAW PROVIDING FOR THE STUDY OF
THE CONSTITUTION OF THE UNITED STATES, AND
AMERICAN INSTITUTIONS AND IDEALS IN THE
EDUCATIONAL INSTITUTIONS OF
THE STATE

Section 1. In all public schools and private schools located within the State of California, commencing with the school year next ensuing after the passage of this act, there shall be given regular courses of instruction in the

West Virginia, Jan. 9, 1919; Washington, Jan. 13, 1919; California, Jan. 13, 1919; Illinois, Jan. 14, 1919; Indiana, Jan. 14, 1919; Kansas, Jan. 14, 1919; Tennessee, Jan. 14, 1919; Arkansas, Jan. 14, 1919; New Hampshire, Jan. 15, 1919; Colorado, Jan. 15, 1919; Alabama, Jan. 15, 1919; Oregon, Jan. 15, 1919; Nebraska, Jan. 16, 1919; North Carolina, Jan. 16, 1919; Utah, Jan. 16, 1919; Minnesota, Jan. 17, 1919; Wyoming, Jan. 17, 1919; Wisconsin, Jan. 17, 1919; Missouri, Jan. 17, 1919; Nevada, Jan. 17, 1919; New Mexico, Jan. 22, 1919; Iowa, Jan. 27, 1919; Vermont, Jan. 29, 1919; New York, Jan. 29, 1919; Pennsylvania, Feb. 26, 1919.

¹The nineteenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a resolution of Congress passed on 5th day of June, 1919, at the first session of the Sixty-sixth Congress, and was ratified, according to a proclamation of the Secretary of State dated Aug. 26, 1920, by the legislatures of the following States: Illinois, June 10, 1919; Michigan, June 10, 1919; Wisconsin, June 11, 1919; Ohio, June 16, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Massachusetts, June 25, 1919; Pennsylvania, June 27, 1919; Texas, June 28, 1919; Iowa, July 2, 1919; Missouri, July 3, 1919; Arkansas, July 28, 1919; Nebraska, Aug. 2, 1919; Montana, Aug. 2, 1919; Minnesota, Sept. 8, 1919; New Hampshire, Sept. 10, 1919; Utah, Oct. 2, 1919; California, Nov. 1, 1919; Maine, Nov. 5, 1919; South Dakota, Dec. 4, 1919; North Dakota, Dec. 5, 1919; Colorado, Dec. 15, 1919; Rhode Island, Jan. 6, 1920; Oregon, Jan. 13, 1920; Indiana, Jan. 16, 1920; Kentucky, Jan. 19, 1920; Wyoming, Jan. 27, 1920; Nevada, Feb. 7, 1920; Idaho, Feb. 11, 1920; Arizona, Feb. 12, 1920; New Jersey, Feb. 17, 1920; New Mexico, Feb. 21, 1920; Oklahoma, Feb. 28, 1920; West Virginia, Mar. 13, 1920; Washington, Mar. 22, 1920; Tennessee, Aug. 24, 1920; Connecticut, Sept. 14, 1920; Vermont, Feb. 8, 1921.

The States of Alabama, Virginia, and Maryland rejected this amendment.

Constitution of the United States, including the study of American institutions and ideals.

Sec. 2. Such instruction in the Constitution of the United States shall begin not later than the opening of the eighth grade, and shall continue in the high school course and courses in State colleges, universities and educational departments of State, municipal and private institutions, to an extent to be determined by the Superintendent of Public Instruction. No pupil shall receive a certificate of graduation from any such school unless he has satisfactorily passed an examination on the provisions and principles of the United States Constitution.

Sec. 3. All persons granted regular certificates authorizing them to teach in the public schools of this State shall in addition to existing requirements be required to pass a satisfactory examination upon the provisions and principles of the Constitution of the United States, or complete a course therein in a teachers' training institution in the State of California; provided, that a limited certificate not exceeding one year in term, may be granted without the passing of such examination or the completion of such course.

Sec. 4. The wilful neglect or failure on the part of any superintendent, principal or teacher, to observe and carry out the requirements of this act shall be sufficient cause for the dismissal or removal of such party from his or her position.

Sec. 5. It shall be the duty of the Superintendent of Public Instruction to make arrangements for carrying out the provisions of this act and prescribe a list of suitable texts adapted to the needs of the school and college grades, as specified in this act.

Sec. 6. All acts or parts of acts inconsistent herewith are hereby repealed.

PART I

THE FORMATION OF THE AMERICAN CONSTITUTIONAL SYSTEM

DEFINITION OF CONSTITUTION

"A constitution," in the language of the Supreme Court of Connecticut, "is that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised; and its provisions are the rules of conduct for those branches of the government which exercise the sovereign power."

In addition to the written instrument, it is a collection of laws, customs and practices which have grown up around the Constitution of the United States and the constitutions of the states.

It is necessary to consider the Constitution historically. Thus, the Constitution as a finality from the standpoint of the original written instrument alone disappears. Only in this way do we get an evolutionary view of our progress as a nation.

The Constitution was an answer to a demand for more effective control of the Union by the government. To understand it requires a study not only of the forms of American control preceding the Constitution, but of imperial control by Great Britain. There was a logical transplanting of political ideas from England to the Colonies, and from the Colonies to the new state.

AN INTRODUCTION *to the* STUDY *of the* AMERICAN CONSTITUTION

CHAPTER I

LEGAL AND POLITICAL IDEAS OF THE BRITISH SYSTEM FINDING A PLACE IN THE COLONIAL SYSTEM

I. The doctrine of royal prerogative.

In some of the colonies, the chief executive enjoyed certain of the prerogatives of the British Crown. The reaction against the exercise of this high prerogative led to the divorcing of the governor of many of his powers, by the people.

II. The leading prerogatives.

Legislative. At the beginning of the seventeenth century, the King had large ordinance powers. Chief among these were the power of veto and the power to dissolve the legislature. Most of the powers enjoyed by the governors were eventually taken away. *Taxation.* Some of this power was retained until 1688. Its exercise in the colonies was almost negligible. *Judicature.* The Crown appointed all judges, and the king himself enjoyed judicial power. The Star Chamber Court was the court of the Crown. The influence of royal prerogative was seen in our Courts of Chancery where the governor was the presiding officer. The governor, as the personal representative of the Crown, in the main appointed the judges

in the Colonies. *Administration.* Here prerogative was practically complete. The governor's power was guaranteed by and authorized by charter corporations. The colonists, fearing so great a grant and guarantee of executive authority under a formal instrument, purposely made the Articles of Confederation weak from the standpoint of administrative authority.

III. The idea of the corporation.

The idea and the history of the corporation begins with the earliest history of America. It flows from and is a creature of the Crown. According to Blackstone, it is an embryonic state, and has the following rights and powers: 1. Perpetual succession; 2. The members choose their successors; 3. A common seal, the outward sign of its impersonal and artificial character; 4. Some sort of organization through which it makes by-laws and provides for their enforcement; 5. Right to sue and be sued; 6. Right to buy and sell land and other property; 7. The right to be represented by its agent. Many of the ideas of government in the colonies were derived from the theory of the corporation.

IV. Feudal elements in the Colonial system.

The subjection of certain classes was legally provided for. Slavery was a natural result of the agricultural and economic system of the time. Indentures of servitude were recognized. Certain classes were distinctly outside the Constitution as first framed. The history of recruiting our population has never been investigated thoroughly. At one time, two-thirds of the settlers in Pennsylvania were bond-servants. Many were brought over as criminals. The patroon system of New York was a feudal regime in miniature. The patroon was in effect a feudal

lord. This element was opposed to the ratification of the Constitution.

V. Conflict of religious theories.

The theocratic and the congregational elements stand out in bold relief. The attitude of the Crown was expressed by James I, who said: "No Bishop, No King." The demand for religious liberty and equality was coincident with that for political equality, and contributed profoundly to democracy in New England.

VI. Popular participation in British national and local government.

Such participation was allowed an owner of land amounting to forty shillings a year under Henry VI. Even so, much of the government was carried on by means of closed corporations. The striking feature is the small participation of the masses even in local government, which was almost wholly in the hands of the justices of the peace appointed by the king. At the close of the eighteenth century, not more than 150,000 took part in the parliamentary elections.

VII. The Revolution of 1688 and its effect on the colonies.

This revolution resulted in the substitution of the dominion of parliament for the power of the Crown. The Crown was thus forced to accept the commercial element as advisers. The rich merchants bought up the estates of the country and became members of the nobility or gentry. The merchants and commercial classes became more important in the parliament, and their influence was reflected in the colonies. The revolution let loose a flood of political ideas which found their way into the colonies. The writings of Locke became the political

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text-book of Adams and Otis, and through his writings they began to inquire into the sources and permanence of authority. His ideas were incorporated into the Declaration of Independence, which served as a justification of the American revolution.

READING

BRYCE.—*Studies in History and Jurisprudence.*

BORGEAUD.—*The Rise of Modern Democracies.*

BLACKSTONE.—*Commentaries.*

FORD.—*Representative Government.*

WHITE.—*The Making of the English Constitution.*

CHAPTER II

THE CONSTITUTIONAL SYSTEM OF THE COLONIES

I. The constitutional organization of a royal or provincial colony (Virginia).

A. The influence of geography. In Virginia, carriage by water was convenient and reasonable. Indentation multiplied the sea-front mileage and possible harbors. This had its influence upon the constitution of Virginia. In time, the great plantation became the effective economic unit. The inevitable result was a planting aristocracy, and county government in contradistinction to town government. The local government of Virginia was much like that of England. The common people had slight participation in the government. This system, while undemocratic, produced a number of great statesmen.

B. The fundamental law of the colony. There were three charters, under the dates of 1606, 1608, and 1612. The main lines of the Virginia constitutional system were laid down in these charters. In the year 1624 the colony became provincial, and the constitution was found thereafter in the governors' commissions. Another source of the Virginia constitution was the instructions issued to the governors. Another source was the statutory law of the House of Burgesses. Around the law grew a body of custom and practices with reference to appointments, and other functions of

government. The first charter reserved large powers to the Crown. Later certain legislative and appointive powers were given to the council or Company. Still later the entire power was conferred upon the Company. In 1624, these institutions were taken over by the Crown, and in place of the Company's governor and council, there were substituted royal officials.

- C. *The royal governor.* He had the usual executive powers, the duty to establish working relations with the council, to fill vacancies in the council, to make laws with the cooperation of the council, and to appoint judges, and military and naval commanders.
- D. *The governor and the council.* The council was composed of twelve of the principal gentlemen of the country. The governor and five members of the council constituted the Court with civil and criminal jurisdiction, and also served as a court of Chancery. The council aided the governor in the disposition of lands, which were often granted to his favorites. It also aided the governor in the distribution of the revenue, and in the matter of war and peace with the Indians. Most of the governor's duties were subject to the approval of the council, which also served as an upper house of the legislature.
- E. *The House of Burgesses.* This house appeared in 1619. The first call for the House stipulated that it should consist of the governor, the council, and two representatives from each plantation, hundred or ward. This system was continued until about 1680, when the two houses were separated.

The qualifications of members were not definite, but they were, in the main, men of wealth.

The governor and the Burgesses were in constant conflict. The colonists claimed all the rights of Englishmen, and asserted further that they did not derive their rights from the king. The right of veto was freely admitted. The greatest disputes concerned the question of salaries. The purse was used as a means to control the governor. Land grants and the disposition of revenue were other sources of friction. Requests for an accounting and the exercise of the veto power led to constant friction.

F. Provincial control over suffrage and local government. The control of *suffrage* was in the hands of the legislature. At first there were no specific qualifications. The first Burgesses were elected by "inhabitants," probably freeholders. About 1650, suffrage was conferred on all freemen. By 1705 the members of the House of Burgesses were required to be freeholders. The suffrage law of 1762 established a freehold qualification for voters. This remained the law until 1829, when negroes, mulattoes, and Catholics were excluded. The control of *local government* was in the hands of the legislature. The statutes regulating local government followed closely the laws and customs of England. The student finds in Virginia, under the colonial system, a mirror of the English social and political system.

II. The constitutional organization of a proprietary colony (Pennsylvania).

- A. The royal grant to William Penn.* The land was given outright, but the government was not vested absolutely in the proprietor. The charter required him to gain the consent of the colonists, who were freemen. A representative assembly was provided for, thus safeguarding the rights of person and property, and guaranteeing the right of participation in the government.
- B. Later plans of government.* The different schemes of government issued in the name of the proprietor were in reality participated in by the people. The influence of popular opinion was extensive. Religious freedom was allowed, with the limitation that offices were open only to Christians. Provision was made for an assembly, composed of four persons from each county. The executive was the proprietor when present, and his deputy in case of his absence.
- C. The representative system of the proprietary colony.* Statutes controlled suffrage and elections. To vote or hold office, one must be a freeholder with fifty acres of land or with £50. The same requirements obtained in the city of Philadelphia. There was, under this system, one chamber of the legislature. A council was appointed by the governor which had no legislative power. Religious liberty was the distinguishing feature of the Pennsylvania system.
- D. The proprietor and the legislature.* The proprietor was dependent upon the legislature, as in other

colonies, for grants of money. The practice of withholding the salary of the governor until desired legislation had been approved, was common.¹ The conflict between the governor and the legislature led to the eventual stripping of the governor's powers in Pennsylvania.

III. The constitutional organization of a corporate colony (Massachusetts).

A. *The grant from the Crown to the Massachusetts Bay Company.* The corporation was essentially a state in embryo. It was, in effect, a little government set up or authorized by the king. In the case of Massachusetts, the members of the corporation settled in America and became the direct government of the people and territory they controlled, with the voters as the stockholders, and the governor as the head of the corporation.

B. *The transfer of the corporation to America.* In Virginia, the members of the corporation remained in England, and transacted their business through agents. In the case of Massachusetts, it was virtually a transfer of the company and its members to the new world. It was incorporated by King Charles I in 1629 under the title: "The governor and company of the Massachusetts Bay in New England." It was but an incorporation of men drawn together by religious ties, with settlement as their object and not profit, as was the case in

¹Franklin, in discussing the practice of the Pennsylvania assembly of holding a bill awaiting signature in one hand, and the governor's salary in the other hand, observed: "Do not, my courteous reader, take pet at our proprietary constitution for these our bargain and sale proceedings in legislation. It is a happy country where justice and what was your own before can be had for ready money. It is another addition to the value of money and, of course, another spur to industry. Every land is not so blessed."

Virginia. It provided for a governor and deputy governor, and 18 assistants chosen from the company, who were freemen. The governor and deputy were chosen by ten people of the company (freemen). All the freemen constituted a grand court with the right to elect officers, admit new members, and make laws. Within itself, the corporation was a democratic body, but was essentially a closed corporation.

- C. *Influence of religion.* Religious influence was profound in Plymouth. The celebrated Mayflower Compact, an agreement written and signed, avowing a common purpose and incorporating under a spirit of concession to and acquiescence in the common good, had much to do with the beginnings and growth of self-government in Plymouth until the charter of 1691 was issued.
- D. *Town government in Massachusetts.* The unit of local administration in Massachusetts, as in New England generally, was the town. Its distinctive institution was the town-meeting, composed of qualified electors, which met as a legislative body to determine policies, select the officers of the town, levy taxes, appropriate money, pass ordinances, and hold to account local officers. This institution was little changed by the Revolution.
- E. *The representative system.* The elector for the member of the legislature, under the charter of 1691, was a freeholder of an estate worth 40 shillings a year, or the owner of other property amounting in value to £40 sterling. The town was the unit of representation. Little effort was made to adjust representation to the population.

F. The charter of 1691 and conflicts with the Crown.

The charter of 1691, unlike other charters, included the powers and organization of the legislature. The governor was appointed by the Crown and was regarded as the king's personal agent. He was both the representative of the British government in the colony, and the chief executive official of the colony. The governor had the usual executive powers, but there were important limitations. He could adjourn, prorogue and dissolve the assembly. He could not appoint the council or upper house. Civil officers were appointed by the governor only with the consent of the council. However, he organized the militia, commanded the armed forces, appointed the chief officers, and declared martial law in case of invasion or rebellion. Here was a division of authority suggesting a separation of powers, which made possible an early and effective resistance by Massachusetts of British control.

G. The Massachusetts' system compared with Rhode Island and Connecticut. In Rhode Island and Connecticut, the governor was elected annually by an assembly consisting of the governor, his assistants, and representatives chosen by the electors. In these states the governor was little more than a figurehead, and acted only in cooperation with his councilors.

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CHAPTER III

CLASSES OF COLONIAL SOCIETY BASED UPON ECONOMIC STATUS, AND THEIR RELATION TO POLITICAL POWER

I. Main sources of immigration from Europe.

The chief *agencies* for colonization were the trading companies, the religious congregations, and the proprietor. The leading *peoples* were the English, representing all classes and settling for a multiplicity of reasons; Scotch-Irish, representing the small farmer and working classes and moved by religious and economic reasons; the Germans, chiefly farmers and artisans, driven to America by persecution and poverty; and the Huguenots and Jews, who sought religious freedom. The classes of immigrants were: the economically independent; indentured servants; involuntary servants, and slaves.

II. Economic classes in New England.

Henry Cabot Lodge has declared that settlers in New England were the country gentlemen, the small farmers, and the yeomanry of the mother country. Moreover, he declared that they were all men of property and good standing. Settlers in New England were almost exclusively of English stock. The manufacture of textiles, the iron industry, shipbuilding, fishing and ocean commerce in New England resulted in the rise of industrial and mercantile classes, and in the course of time, the professional class. It also led to a certain economic independence. Geographical and climatic conditions, com-

bined with the unpopularity of rents, developed an independent class of small farmers in New England who insisted on owning the freehold, and opposed tenantry and servitude. The rôle of the small community was important, both socially and politically. Restrictions were placed on the right of suffrage by all New England colonies.

III. Economic classes in the Middle colonies.

The following classes formed the composite population of New York: 1. The Dutch and English aristocracy; 2. The merchants of New York; 3. Small landed proprietors; 4. Small farmers, mechanics, etc.; 5. Indentured servants; 6. Slaves. In the main the Middle colonies were peopled by the English, the Scotch-Irish, and the Germans. The manors and proprietors of the Middle colonies maintained an economic and social hierarchy much like that of feudal times. This was especially true of the landed proprietors of New York. Indentured servants formed a large part of the population. The slave population was large in Delaware and Pennsylvania. *Suffrage* was generally limited to freeholders, except in Albany and New York, where it was limited to freemen. Catholics were excluded by law, as were the Jews. The vote in New York was from one-ninth to one-fourteenth of the population, and about one-eighth of the population was entitled to vote.

In Pennsylvania, the classes were: 1. Well-to-do Quakers, and the landed aristocracy; 2. Small farmers; 3. Mechanics and artisans; 4. Indentured servants. It is estimated that for the periods 1682-1708, 1708-1728, and 1728-1804, the indentured servants constituted respectively one-third, one-half, and two-thirds of the popula-

tion. Of these the largest number were Dutch, and there were many Irish. Only freeholders or owners of personal property could vote. One must own 50 acres, with 12 acres cleared, or have £50 lawful money, in order to vote. The mechanics protested against this system during the revolution, hence all qualifications were then swept away.

IV. Economic classes in the Southern colonies.

In Virginia the class system was clearly marked. The main classes were: 1. Planters; 2. The middle farming class, i. e., smaller planters; 3. The yeomanry; 4. Indentured servants; 5. Slaves. The immigrants were chiefly English and Scotch-Irish. At the top of the social and financial hierarchy was the planter, who resembled the English landlord. With slavery and forms of servitude an essential and integral part of the economic system, there was much less ownership in fee of small farms, and a larger dependence upon England, both economically and culturally. The plantation was the center of community life, and the county, distinctly a rural area, was the unit of local government.

Suffrage in Virginia was regulated for fifty years by the law of 1762. To vote, one must be a freeholder to the amount of 50 acres in the country, or a lot in a town. The number of voters was larger than in the other colonies. There was a more general exercise of the right of suffrage than in the other colonies, even though it was not more democratic. The predominance of the planting aristocracy in matters of elections and government was maintained.

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CHAPTER IV

GENERAL FEATURES OF BRITISH CONSTITUTIONAL CONTROL IN THE COLONIES.

I. Veto.

Appeals were made to the king in council. Due to the activities of the merchants, the Board of Trade was created in May, 1696, although opposed by the Crown. The process follows: 1. Laws were first sent to the Board of Trade; 2. They were then sent to the law officer of the Crown, who passed upon their constitutionality. 3. The laws were then returned to the Board of Trade, which conducted hearings of the interested parties. 4. The merchants had regular representatives to appear before the board. 5. The laws were then sent to the Privy Council with recommendations. The power of veto was practically unlimited.

II. Appeals.

Even in the charters, where no provision was made for appeals, it was regarded as an inherent right to appeal from the colonial courts to the King in council. By act of Parliament, all laws and customs in the colonies in conflict with the laws of England, dealing with colonial affairs, were declared to be null and void. Moreover, it was enacted that the crown and Parliament of Great Britain had the authority to pass laws binding the American colonies in every respect. In the case of *Winthrop v. Lechmere*,¹ the property of one Winthrop was divided

¹Thayer, Cases on Constitutional Law, Vol. I, p. 34.

equally among his children at death, under a law of Connecticut. An action was brought, and an appeal was made. The Connecticut law was held null and void by the Privy Council, "as being contrary to the laws of this realm, unreasonable, and against the tenor of their charter, and consequently the province had no power to make such a law."¹ Later, the Supreme Court of the United States assumed jurisdiction over cases involving state constitutional questions. This colonial experience explains in part the acquiescence by the people in the assumption by the courts of the power to invalidate laws on constitutional grounds.

III. Control of the monetary system by Parliament.

By act of Parliament of 1763, such colonial laws as authorized paper money or extended the life of outstanding bills, were declared void. Bills of credit were, in effect, forbidden to the colonies.

*** IV. Control by the governor over colonial legislatures.**

The governor could in general dismiss members of the council, and could veto bills of the provincial legislatures.

V. Appointment of judicial officers.

This was the function of the governor, who could also constitute courts.

VI. Regulation of trade.

Foreign and inter-colonial trade was regulated by Parliament. A North Carolina law taxing peddlers was annulled on the grounds of restricting trade. Virginia was

¹Ibid., p. 36.

forbidden to close its ports to North Carolina. Indian trade was in theory regulated in behalf of the empire, but really in favor of the merchants. The British monopoly of colonial trade was fully in effect.

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CHAPTER V

AMERICAN POLITICAL THEORIES AND CONSTITUTIONAL DOCTRINES PRECEDING THE REVOLUTION

I. State papers illustrative of doctrines.

1. Colonial charters generally.
2. *The New York Charter of Liberties* of 1783 includes the following: 1. A guarantee of a session of the general assembly once in three years. 2. Suffrage is granted freeholders. 3. No member of the legislature can be molested during the session, for legislative acts. 4. A bill of rights. 5. Due process of law is provided for. 6. Jury trial.
3. *The Stamp Act Congress of 1765*. The following principles were laid down in its declaration: 1. Claimed the rights of subjects born in England. 2. Against taxation without a voice in levying the tax. 3. Due to circumstances, the Colonies could not be represented in the Parliament. 4. The representatives of the colonies should be selected by themselves. 5. No tax could be levied except by the colonial legislatures. 6. All grants to the Crown were free gifts. 7. Trial by jury regarded as an inherent right. 8. Right of partition regarded as an inherent right.
4. *The Massachusetts circular of 1768*. 1. Parliament has no right to tax Americans without their consent. 2. Colonists, from the nature of the case, cannot be represented in Parliament. 3. People are not free who are subject to governors and judges appointed

by the Crown and paid out of funds raised independently. 4. Other colonies should consider the common situation.

5. *The Virginia resolutions of 1769.* 1. The sole right of levying taxes in Virginia is vested in the legislature. 2. The right of petition still remains. 3. The trial of Colonists overseas was condemned. 4. A redress of grievances was sought.
6. The declaration and resolves of the First Continental Congress enforced by vigilance committees.
7. The Declaration of Independence, and the doctrine of natural rights.

II. Doctrines held by leading Americans.

There was no revolutionary literature on the eve of the revolution comparable to that of the French Revolution. Many colonists read the writings of John Locke, and due to this influence, shifted their defense from that of the rights of Englishmen to the claim of the natural rights of man. The American philosophy of government is found in the views of certain representative men. *Otis* rested his assertions on the ground of constitutionality, but as the conflict approached, he shifted to the theory of natural rights. *Samuel Adams* took the view that government was not founded on compact or force, but through necessity. *John Adams* thought that rights were derived from the legislator of the universe. *Thomas Paine* contended that legitimate authority sprang from the consent of the governed. He discarded the theory of the rights of British subjects and based his arguments on natural rights. Government, in his estimation, was produced by our wickedness. *Alexander Hamilton* did not regard the rights of the colonists as flowing from

old parchments or documents adopted by them, but as flowing from man himself. In this manner the leaders deserted their doctrines based upon constitutional documents and seized upon the theory of natural rights.

III. Rights sought by the Colonists.

The rights asked by the colonists, based upon the rights of Englishmen, were: 1. Participation in the government, and a negative control over the laws and decrees of Parliament. 2. A legislative assembly composed of local subdivisions, and elected by freeholders. 3. No taxes to be laid without the consent of the local legislature. 4. No one to be deprived of life or liberty without trial. 5. Indictment by a grand jury. 6. Fines should be in proportion to the offense. 7. Bail should be reasonable. 8. No one should be compelled to render public service except by law. 9. No property should be taken without due compensation. 10. There should be no quartering of soldiers. 11. No person professing the faith deemed essential by a particular colony should be molested.

IV. Relation to the Revolutionary doctrines of 1688.

The rights sought by the colonists were negative in character, and in the main were intended to guarantee individual rights. The colonists therefore took a negative rather than a positive view of the state, and consequently fell back upon the individualistic conception of the state. In framing a formal justification of the Revolution, however, the colonists adverted to the philosophy of natural rights. The whole people did not rise in support of this theory, and it is the opinion of some historians that the work of the Revolution was the work of a minority. Clearly the political instruments used to break down the claim of Great Britain—the committees of cor-

respondence—were extra-legal, and in the course of time supplanted or assumed the authorities formerly exercised by loyal provincial and local government bodies. The philosophical justification of the American government, therefore, rests upon the doctrine of natural rights of man, and of the imprescriptible rights of Englishmen resulting from the Revolution of 1688.

V. Constitutional principles growing out of the conflict with Great Britain.

These were: 1. Constitutional limitations. 2. The operation of theories and doctrines in their relation to actual government. 3. Natural rights. 4. Representative institutions. 5. Legislative supremacy. 6. Personal rights and liberties. 7. The primacy of the courts.

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CHAPTER VI

MODES OF CONTROL AND THE DEVELOPMENT OF INSTITUTIONS DURING THE REVOLUTION

I. Instruments of revolutionary propaganda and government.

The legalistic view of the Revolution is not altogether justified by the facts. In some cases it was a group of revolutionists, rather than a group of states rising against the home government. The Committees of Correspondence were organs of propaganda in the first instance. The national committee or convention was an outgrowth of local committees.

Revolutionary procedure in a colony (New York). The various classes of society differed as to procedure. The merchant class favored active protest, but did not favor revolt. The lesser classes inclined toward radical action. Ten days after the Stamp Act Congress, the mechanic class organized the "Friends of Liberty" society, in answer to the protest of the merchants. Open violence on the part of this group was opposed by the merchants under the leadership of Robert R. Livingston. There were thus two classes, the merchants, who could afford to wait and who favored passive resistance, and the laboring class who could not wait for a constitutional redress of grievances. As a result, many were thrown out of work. In January, 1774, the "Sons of Liberty" held a meeting and passed a resolution against the use of stamped paper, and at the same time appointed an executive committee to carry into effect the resolution. Two

legal systems, therefore, were opposed, the British, and that of the new state. The situation stood thus at the time of the repeal of the stamp act.

The conservatives, to escape from this position, called a meeting of 27 conservatives and 23 radicals. Unable to agree, the meeting adjourned. They met again, after an appeal for harmony, with 27 conservatives and 24 radicals present. The conservatives voted down a non-importation act, and were in control when the news came from Boston that a Continental congress would be held. The manner of electing delegates arose. The mechanics desired manhood suffrage, but the conservatives objected. It was agreed that the committee should nominate, and a compromise was arranged in the selection of delegates. This procedure was followed more or less in all the colonies.

The *First Continental Congress* of 1774, was extra-legal. Delegates were chosen by irregular revolutionary agencies, varying in the different colonies. In Massachusetts, they were chosen by town committees; in Connecticut by the committee of correspondence; in New York, as described above; in New Jersey, by committees appointed by the several counties; in Delaware, by the freemen of the counties; in Virginia, by county committees; in South Carolina, by a general meeting of the people; in North Carolina, by a general meeting of the deputies of the counties. The first Continental congress did much to establish the new state. It passed a non-importation act; provided for the election of committees of enforcement by those qualified to vote for members of the legislature; and imposed a test of loyalty. The enforcement committee carried the laws into effect. A civil war resulted, as well as a Revolution.

The Second Continental Congress of 1775 was constituted in much the same way. It assumed authority, and performed all the acts of a sovereign body. Its chief functions were the organization of the government of the United States; the prosecution of the war; its exercise of sovereign powers; and its contribution toward union.

Evolution of revolutionary instruments within a state. New York may be taken as an example. The last colonial assembly was held in 1769. This was a legal body. It held sessions from time to time until April, 1775. In January, 1775, a vote was taken on the activities of the Continental Congress. The same group passed from a legal body through a revolutionary body, to a new legal body. The committee of fifty-one was contemporary and parallel with the provincial assembly. The first provincial congress was held in 1775 as a successor to the provincial assembly; the second in the same year; the third in 1776; and the fourth in the same year, which drafted the Constitution of 1777 and put it into effect without popular ratification. Of this fourth Congress, 23 members had been in all the previous congresses, and only six of the entire 107 members were without experience in a revolutionary body. The constitution of 1777 was drafted by one-third of this extra-legal body. In January, 1778, the government set up by this Congress became the government of the state.

II. Jefferson's plan of a Constitution in 1776.

It embraced the following points: 1. One branch of the legislature (the lower) to be elected by popular vote, only freeholders and taxpayers voting. 2. Representation should be apportioned according to the number of electors. 3. The Senate or upper house to be elected by the lower house, and one-third to retire every three years.

4. The administrator to be appointed by the legislature.
 5. The Council to be appointed by the legislature.
 6. Judges to be appointed by the administrator and council.
- The legislature only rested upon the will of the people under this plan, which shows the assumption of power by the legislature.

III. Changes made by the first state constitutions.

These were :

- A. *The destruction of executive power.* Except in Massachusetts and New York the executive became a mere figurehead. In these states he was elected by the people. His term of office was reduced to one year or a trifle more. The Governor, having embodied the authority of the Crown, was stripped of this power under the first state constitutions.
- B. *Substitution of an elective body for the old council.* In many states this became the Senate, the smaller and upper house. In Georgia, there was only one house.
- C. *The judiciary.* The courts were made responsible to some popular organ of government. The popular election of judges is a nineteenth century development.
- D. *Qualifications of officers.* The governor was generally required to possess considerable property. The same was true of members of the legislature. In some cases it was required that legislators should be Protestants.
- E. *Suffrage.* In Massachusetts, one must have capital yielding an annual value of £3, or a freehold of

£60. In New York, voters for the governor and senators had to have a freehold worth £100; voters for other officers, freeholders of £20. In cities, freemen paying taxes could vote. The reduction of suffrage requirements in New York was due to the conflict between the mechanics and the conservatives. In Virginia there was no change. In South Carolina, free white men owning a freehold of 50 acres and believing in a future state of rewards and punishments could vote.

IV. Control under the Articles of Confederation and imperial control.

Under the Articles there was no appeal to a higher court or other power, as under imperial control. Taxation, while levied with the implied consent of the people, was mainly in the form of requisitions. Safeguards and limitations against the legislatures, so plentiful under the imperial regime, were swept away.

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CHAPTER VII

THE GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION

I. Organization of the government under the Articles.

A. The Congress. The Congress was to consist of not less than two nor more than seven delegates from each state. The vote was by states, i.e., each state was entitled to one vote. The states had the right to recall their delegates.

B. There was no arrangement for a permanent *executive*. A committee of one delegate from each state was provided for, with power to act when the Congress was not in session.

C. The courts. No arrangement was made for judicial power except in admiralty.

II. Limitations upon the states.

The power to make treaties and to declare war was given to the Congress. It was provided that no change could be made in the Articles except with the consent of Congress and the ratification of the state legislatures. Each state retained its "sovereignty, freedom and independence, and every power, jurisdiction and right" not expressly granted to the United States.

III. Economic and financial conditions under the Articles.

A. As to raising revenues. This was to be by a system of requisitions on the states in proportion to the value of their lands. This system was not adapted

to raising revenues, building a navy, raising an army, regulating commerce, discharging public debts, and other necessary acts essential to a sovereign state. Even the soldiers could not be paid. They disbanded after the war and were paid in scrip. Officers formed an organization known as the "Society of Cincinnati," one of whose objects was to obtain their pay. The officers, holding large quantities of this paper money, with no redemption in sight, sought a stronger government which could pay. The privates had disposed of their paper at reduced prices.

B. As to the discharge of debts due the British. The legislatures of the Southern states had tried either to wipe out the debts owed to British merchants, or to postpone payment. The northern states favored some method of compelling the Southern states to pay, because the British would not give up possession of the Northwestern ports until the debts were paid, thus depriving the North of the fur trade. American merchants were denied credit in London until the debts were paid. The North, therefore, favored a government providing for suits being instituted in independent courts. The South also owed money to the North. After the war, the colonies were in a worse condition with respect to trade than before. In 1783 an Order in Council required that all trade should be in British ships. Trade with the West Indies was cut off. Under the Articles, England was able to play one state against another. John Adams sought concessions from the British Foreign Office, but England

refused, knowing that the United States had nothing to offer in return.

The early trade of the New Englanders with the west coast and the Orient was practically ruined.

C. As to the fiscal system. The monetary system was in a disordered condition. Foreign coins prevailed almost exclusively. Pennies were coined in Connecticut. A traveler, changing an English pound, might expect change in several different kinds of coins. There were many clippers and counterfeiters, even the government clipping its coins. Specie was scarce, and was more so at the close of the war. British demands of payment in specie drained the country still further.

The collection of debts. During the war, debts were suspended. The debts of soldiers were suspended by joining the army. After the war, pressure was brought to bear against the debtors. There were many lawsuits. In the city of Worcester there were 2,000 foreclosures in one year. This caused a great cry for more paper money.

Action of the states to meet this demand. Seven of the thirteen states issued paper money unsupported by specie. Pennsylvania began to issue bills of credit in 1785, which soon fell to 88. In North Carolina, paper money fell to 70. There was depreciation in South Carolina and Georgia. In New York the shopkeepers and artisans demanded paper money, which was issued in 1786. In Rhode Island, paper money was issued on farm values. The commission was liberal in evaluating property, and large amounts of money were issued.

Depression set in, leading to action by the courts. Due to the decision in the case of *Trevett v. Wheeden*,¹ the judges were brought before the legislature, but were not dismissed. This was the first great case where a court declared an act of the legislature unconstitutional.

Action of the Confederate government. This government issued paper money, also. The issue varied from six millions in 1775 to 140 millions in 1779. In 1780, the value of the dollar had been reduced to two cents.

The great public debt. This amounted to about seventy millions of dollars. Ten millions was held abroad. Much of this paper had been obtained by the citizens. There was no money to meet interest payments. The arrears in the domestic debt increased from \$3,100,000 to \$11,400,000, and the foreign debt from \$67,000 to \$1,640,000, from 1784 to 1789. The creditors, therefore, were not getting their interest. The debt of seventy millions comprised one-fifth the value of all the lands in the country, and about equal to the rest of the wealth of the country, i. e., personal property.

Demands for a change. The merchants and creditors wanted a government with power to regulate money matters. This was also true of the speculators. In the West, certificates sold for as little as eight cents on the dollar. This paper had passed from the hands of small holders to speculators, especially in the South. This class, ordinarily conservative, was most active in securing a change in government. The change was also supported by

¹Varnum, James M., *The case of Trevett against Wheeden* (1787).

the many bona fide holders of government securities. Leading men, as Washington, Hamilton, King, and Morris, favored the change on the grounds of sound fiscal policy. These demands found concrete expression in the newspapers and in letters.

IV. Resistance to creditors in collecting debts and in staying the issue of paper money—Shays' rebellion.

There was a struggle over debts and paper money in all states issuing it, but only in Massachusetts did it lead to civil war. The private debts amounted to £300,000. The state owed a huge debt, especially to its soldiers and for the war. Specie was drawn from the state by purchases and payments abroad. One Daniel Shays, a captain during the Revolution, organized a movement to resist the state government. Their grievances were: increased cost of legal proceedings charged by the lawyers; heavy taxes; the refusal of the legislature to issue paper money; the foreclosure of mortgages by creditors against farmers heavily in debt; and the scheme of representation in the state senate, based upon the amount of taxes paid. The revolt spread through the state, but was finally quelled.

Shays' rebellion, while a protest against the action of creditors and the state government, demonstrated clearly the necessity of intervention on the part of the national government to aid a state government when violence was set in motion beyond the control of the state government. Washington commented thus on Shays' rebellion: "What, gracious God, is man that there should be such inconsistency and perfidiousness in his conduct! It was but the other day that we were shedding our blood to

obtain the constitutions under which we now live—constitutions of our own choice and making—and now we are unsheathing our sword to overturn them.”

V. Attempts to amend the Articles.

In 1781, the Continental Congress adopted a proposition authorizing the levy of five per cent on imports, but this measure was rejected by the states. In 1783, the Congress proposed an amendment authorizing a tax on imports to be collected by state officials and applied on the public debt. This measure failed, also. In 1786, a special appeal was made to the states, pointing out their neglect in paying their quotas and the resultant impairment of the credit of the United States. In the opinion of the Congress it was no longer honorable to look to this source for meeting the public debt.

VI. Summary of objections to the Articles, growing out of the experience of the government under them.

- a.* No executive provided for. *b.* No judiciary established. *c.* A disordered fiscal system. *d.* Inability of the government to pay the public debt, both interest and principal. *e.* No effective control of interstate and foreign commerce. *f.* Inability to enforce treaties with foreign governments. *g.* No power to collect taxes. *h.* Complete reliance upon the state governments to enforce laws of the Confederate government. *i.* Inability of the Congress and the national authorities to act against an individual directly in the enforcement of laws. *j.* Need of national aid for a state government when threatened with violence beyond its control. *k.* The legislature under the Articles ignored population altogether as a basis for representation.

VII. The movement toward a "more perfect union."

Statesmen of the Revolutionary period with great experience in war, diplomacy, and administration, naturally favoring highly centralized executive authority, urged a reorganization of the government. This school of statesmen started a conflict which persisted subsequently in dealing with questions of construction and interpretation. *Hamilton*, in 1780, suggested a convention for the purpose of writing a new constitution based on the political and administrative principles of the school to which he belonged. *General Washington* sent a circular letter to the governors of the states, pointing out that the union could not survive unless a supreme power was established "to regulate and govern the general concerns of the confederated republic."

Certain of the *state legislatures* urged a revision of the Articles. The governor of Massachusetts in 1785 secured legislative approval of a call for a general convention to increase national authority. The effective call came from the Virginia legislature which asked that delegates from the states meet at Annapolis in 1786 to discuss the problems of commerce and taxation.

The Annapolis convention. Five states alone were represented. The degree of dissatisfaction could not be measured by this seeming indifference. Upon motion of Alexander Hamilton of New York, a resolution was adopted, recommending the Congress to ask the states to send delegates to Philadelphia the next year for the purpose of considering the Articles and suggesting such

changes as would make the instrument meet the needs of the union.

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CHAPTER VIII

THE NATIONAL CONVENTION HELD AT PHILADELPHIA IN 1787

I. The congressional resolution of February, 1787, calling the Convention.

The resolution of call stipulated that the convention should be held for "the sole and express purpose of revising the Articles of Confederation." Moreover, changes and additional provisions which, in the judgment of the convention, were required to render the Articles more adequate to the strengthening and preservation of the Union, should be referred to the Congress for agreement, and to the states for confirmation.

All states but Rhode Island responded to the call. This state feared the loss of its control of commerce.

II. The delegates to the Convention.

Of the sixty-five delegates elected, fifty-five attended the convention. From the standpoint of *political experience* and *patriotic services*, there was practically complete representation. Political theory was represented by James Madison, the "father of the Constitution"; law, in James Wilson and Alexander Hamilton; finance, in Hamilton and Robert Morris; diplomacy in Franklin; the war and administration in George Washington. Dickinson, Johnson and Rutledge had served in the Stamp Act Congress. Read, Sherman, Wythe, Gerry, Franklin, Morris, Clymer and Wilson had signed the Declaration

Yes
of Independence. All but twelve had seen service in the Continental Congress. Washington, Hamilton, Mifflin, and Charles Pinckney had been officers during the Revolution. Seven had been governors of states. Many had had experience in colonial and state politics and administration. Potentially, many were yet to reach the prized places in state and national governments. Thomas Jefferson, Samuel Adams, Thomas Paine, and Patrick Henry were not in attendance. Benjamin Franklin, having probably the most varied political and diplomatic experience of all, was the only delegate and the only American claiming the distinction of having helped to frame and having signed the four great documents and state papers of the Revolutionary and reconstruction periods: the Declaration of Independence; the treaties of alliance and commerce with France in 1778; the treaty of peace with Great Britain, 1783; and, the Constitution of the United States.

From the standpoint of *profession* or *occupation*, there were 33 lawyers, 8 men in business, 6 planters, 1 educator, 1 physician, 2 men engaged in the public service, and 3 without any special occupation. The representation of *economic interests* was as follows: 40 holders of public securities (depreciated treasury bonds), 24 capitalists, 15 slave owners, 14 dealers in speculative real estate, and 11 manufacturers and commercial men. A majority were graduates of colleges. "Never in the history of political assemblies has there been brought together so much sheer intellectual ability." The proof of this statement is found in the duration of their product.

IV. The credentials of delegates, and their powers under their instructions.

The credentials of the delegates varied somewhat according to the states, but in general the instructions, in accord with the resolution of Congress calling and authorizing the Convention, called only for a revision of the Articles. The Massachusetts delegation was instructed only to revise the Articles. New Hampshire instructed that the defects be remedied, and that a report to Congress be made for confirmation by the states. Connecticut limited the delegates to changes and provisions agreeable to the general principles of republican government. New Jersey asked that the delegates take into consideration the state of the union with respect to trade, etc., and to take steps to make the Constitution adequate. Pennsylvania authorized its delegation to deliberate and to render the Constitution fully adequate to the exigencies of the Union. The Delaware instructions resembled closely the resolution of Congress. Virginia wanted the delegates to secure the great objects for which the union was founded. Maryland desired a revision of the system of government. North Carolina sought to remedy the defects of the union. South Carolina instructed the discussion of alterations which would render the government fully adequate. Georgia sought also to make the fundamental law an adequate instrument.

IV. Organization and procedure of the national convention.

Presiding officer. Washington was chosen to preside, Franklin having withdrawn in his favor. A *Secretary* was chosen to report the proceedings and the action of the Convention. *Balloting.* It was decided that seven

states should constitute a quorum, that a majority vote of the states would be required to decide all questions, and that each state should have one vote. *By-laws* and rules of procedure were decided by the Convention itself. *Meetings* were held behind closed doors, and the proceedings were secret, in order that there might be the frankest discussion possible of the problems facing the convention.

Stages in the development of the Constitution:

- A. May 14-June 13, Committee of the Whole, the Randolph Plan.
- B. June 14-19, the Patterson Plan and the Hamilton Plan.
- C. June 19-July 26, debate on Randolph Plan resumed. Committee of Detail appointed July 24. Resolution of Committee of Detail referred on July 26.
- D. August 6-September 10, debate on the plan of the Committee of Detail. Appointment of the Committee of Style.
- E. September 12-17, debate of the plan of the Committee of Style.

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CHAPTER IX

THE PLANS FOR THE ORGANIZATION OF A GOVERNMENT

I. The Peletiah Webster claim.

The claim has been made that as early as 1781 Peletiah Webster had proposed a plan for a new fundamental law. In 1791, Webster declared that the Convention had taken his plans and had qualified them. He was only one of many who were thinking over a plan of government for the United States to supersede the Articles.

II. The Randolph or Virginia resolutions.

This plan embraced the following points:

- A. The rights of suffrage should be in proportion to the number of free inhabitants or their quota of contributions.
- B. The national legislature should consist of two branches. It was more to provide checks and balances than to provide for equality of representation. The members of the lower branch were to be chosen by the people. The lower house should elect members of the upper house from a list of persons nominated by the state legislatures.
- C. The national executive to be chosen by the national legislature, and to be ineligible for election the second time.
- D. A national judiciary to be chosen by the national legislature and with a limited jurisdiction, as the

right to try cases of impeachment and to try suits to which foreigners should be parties.

- E. The powers of the Congress were to be very broad, and not enumerated or delegated powers. The right to legislate extended to all cases where the states were incompetent, or where the general interest demanded. This plan, coming from Virginia, was much stronger than the one adopted.
- F. The Congress should be invested with veto power over acts of the state legislatures, and could call out the militia against the states to compel obedience.
- G. The executive and a convenient number of the judiciary should constitute a Council of Revision to consider an act before it should go into effect. This was to be a check on the legislature.
- H. Amendments to the instrument were to be submitted to the states for ratification.
- I. The provisions of the "Articles of Union" were to be binding upon and enforced by officials of the states.

III. The Charles Pinckney plan.

On May 29, Pinckney presented a plan which was submitted to the Committee of the Whole. Nothing more was heard of it until it was submitted to the Committee of Detail in July. It was not debated, but went to this committee and disappeared. There has been much conjecture as to the effect of this plan. In 1818, John Quincy Adams wrote Pinckney, asking for his plan. In his letter of transmittal, Pinckney observed that his plan was substantially the one adopted by the Convention. Such men

as Madison and King were of the opinion that the plan described by Pinckney was not what was submitted to the Convention. The claim of investigators is that Pinckney's claim is not valid. Moreover, his plan contains provisions which were arrived at as compromises after long debate. The Pinckney plan has been reconstructed from the Wilson papers.

IV. The Paterson or New Jersey scheme.

This plan contains certain fundamental principles, but was designed to save the Articles of Confederation. Its leading features were:

- A. Seeks a revision of the Articles of Confederation.
- B. Would increase the powers of Congress to include the regulation of trade, the issuing and collection of requisitions, and the taxing of imports.
- C. Would establish a plural executive.
- D. A judiciary to be appointed by the executive.
- E. Treaties and acts of Congress were to be the supreme law of the land, the acts of the state legislatures to the contrary notwithstanding.
- F. Provision was made for the extradition of criminals, the admission of new states, and the enactment of uniform naturalization laws.

V. Hamilton's draft.

The design of Alexander Hamilton embraced the following salient points:

- A. Universal manhood suffrage.
- B. The lower house to be elected by all free male citizens.

- C. The Senators were to be chosen for life by electors chosen by the voters. A land qualification was to be required of the electors.
 - D. The executive was to be chosen for life by electors.
 - E. Federal judges were to be appointed and to hold office during good behavior.
 - F. The governors of the states were to be appointed by the national government.
 - G. Congress should have the power to pass all laws for the common defense and for the general welfare.
- Under this plan, Hamilton hoped to neutralize the powers of the voters and the lower house, and to provide the form of a democracy without the dangers which attend popular institutions of government.

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CHAPTER X

THE CONSTITUTIONAL CONVENTION AND ITS RELATION TO THE PRINCIPLES OF DEMOCRACY

I. The fear of majority rule, and means proposed to check it.

To the Fathers, democracy meant the rule by the masses, unchecked and unrestrained. They were afraid of democracy. Clearly, they were on the lookout for means to check majority rule. It was discussed whether or not any part of the Congress should be elected by the people. *Roger Sherman* was opposed to direct participation by the people. *Gerry* also feared the people. *Madison* went into the problem of democracy more fully, and favored the election of the lower house by the people to break down the power of the state legislature. *Gouverneur Morris* regarded the Senate as a check. For this body he favored a propertied interest and an aristocratic spirit. It should also have something of an independent status. He believed thoroughly in the consolidation of the interests of the rich and poor as separate interests, to provide a check upon one another. One should be set up against another. If the rich mingled with the poor, in his opinion the poor would rule. He was against proportional representation in relation to population, but favored it as regards property. To *Morris*, therefore, property was the main interest of government.

In the minds of these men, majority rule meant the rule of the propertied class by the propertyless class. It would

mean, to them, a continued conflict between the two, unless checked by fundamental law. The following remedies for this condition were proposed:

A. That the people should have as little part in the government as possible, without serious dissatisfaction. This did not mean that the people should have no part in the government.

B. That the upper works or mechanism of the government should be so constructed as to refine the crude proceedings of the lower branches. A property qualification and an indirect system of elections were therefore proposed for the upper house.

Wilson, of Pennsylvania, favored the popular election of the Senate. *Pinckney*, of South Carolina, favored the popular election of one house, because in his opinion equality was a fundamental condition in a democracy, where the distribution was so widespread, and would be increasingly more so.

II. Should there be established a direct or a representative system of government?

To the Fathers, direct government meant such government as existed in Rome and the Greek City States. Of all kinds, direct government was the most odious to the framers of the Constitution. They saw a remedy to the problem in representative government. In support of this, Madison expressed a purely materialistic view of politics. To him, the first object of government was to protect the exercise of faculties for acquiring property. The starting point is the differences in faculties; therefore there arise differences in amounts and kinds of property. These produce views and sentiments. From

this condition parties arise. The source of factions is the unequal distribution of property. The causes of factions cannot be removed; hence the necessity for controlling them. Madison declared that the object to which their endeavors were directed was how to prevent majority rule and to preserve the spirit and form of popular government. Representative, as opposed to direct, government, was the answer.

III. Plans to limit the suffrage and their abandonment.

The Virginia plan proposed the election of the lower house by the people. Roger Sherman remarked that the people should have as little to do as possible with the government. Popular elections were suggested by Mason and Madison, with the thought that states rights might be broken down in this way. By a vote of 6 to 2, popular election of one branch was carried. It went to the Committee of Detail, which reported the provision now in the Constitution.

No qualifications were placed on suffrage, but much discussion preceded this decision. Morris favored limiting the suffrage to freeholders. Wilson, of Pennsylvania, pointed out that the variety of qualifications in the states was a burden. In the opinion of Ellsworth, it should be left to the states, since their ratification of the instrument had to be secured. Dickinson favored a freehold qualification. Failing to agree, the regulation of suffrage was left to the states by a vote of 7 to 1.

IV. Should officers of the government have a monied qualification?

In the opinion of Charles Pinckney, officers should not be popularly elected. Moreover, he proposed a \$100,000 qualification for President and \$50,000 for members of the Supreme Court.

V. Should there be a "national" or a "federal" government?

The system intended by the framers led to a long political contest. Did they propose to leave the states free and independent, or to give the status of sovereignty and independence to the Union? There was clearly a difference between the desires of the Convention and of the ratifying authorities. It was, in effect, the question of sovereignty, and whether it was located in the state or in the nation. This question did not receive the careful attention owing to its abstract character. The members were interested in practical questions of national defense, taxation, and the economic situation. Questions of abstract politics rarely find a place in convention discussions. According to Madison, sovereignty could not be defined. No one knew what it was. All that exists is a concrete manifestation of power which may be here today and there tomorrow. He claimed that power was divisible.

It is a fair assumption that the voters intended to approve a Constitution retaining the sovereignty of the states. The result was really a system from which it was impossible to withdraw. The majority of the Convention thought they were making a system from which a state could not withdraw. The great majority of ratifiers intended quite another thing. To Madison, it was a mixed system, and ratification was federal and not national; the House national; the Senate federal; the executive a compound of both; the Constitution in its operation was national and not federal, because it deals with individuals and not states; in the extent of its powers it is federal and not national, because its powers are enumerated; and the amendment section was a compound.

The question of the nature of the instrument was discussed in the Convention, not as a philosophy of govern-

ment, but as a working arrangement. On May 30, a resolution was passed declaring that a national government should be established. Connecticut was opposed to this. The New York delegation was divided on the question.

It is pointed out by A. H. Stephens that this was amended by striking out "national" and inserting the "United States." Luther Martin declared that this was done because it might create alarm.

Lansing, of New York, stated that if New York had known a national government would be created, no delegates would have appeared. Gouverneur Morris said that he went to the Convention not as the representative of any particular section but as the representative of America, and, in a sense, of the human race. General Pinckney declared we needed a national government, leaving as much power as possible to the states.

Luther Martin pointed out that there were three parties in the Convention: 1. Those who wanted to abolish state lines. 2. Those truly federal and republican. 3. Those representing the large states, wanting to gain particular powers over the other states. These groups represented, respectively, the following classes: the nationalists, the federalists, and those inclined toward imperialism. The first and third groups combined, he said, and formed a national as opposed to a federal government, "designed not to protect and preserve, but to abolish and annihilate the state governments." He therefore withdrew from the Convention and opposed the ratification of the instrument.

The number of voters participating in ratification was about 150,000. In the act of ratification, group interests clearly controlled, and brought it about. The considera-

tions of defense and commerce were uppermost. A referendum on the question of nationalism might have resulted in its defeat.

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CHAPTER XI

THE EXECUTIVE DEPARTMENT UNDER THE CONSTITUTION

I. The executive under the Articles.

Here the executive, as such, was practically non-existent. Much of what is regarded as executive power was conferred upon the Congress. In this field, the Convention had practically a free hand.

II. The form of the executive.

The Convention was definitely against monarchy as such. John Adams feared that the executive might in the course of time become a monarch. Dickinson, while personally favoring monarchy, admitted the impossibility of its application to the United States, on the ground that the states would not ratify such a provision.

The veto power in the Randolph plan was in the hands of a Council. Randolph was thinking of a plural executive. Hamilton was in favor of a President who would serve during good behavior. Writing in the *Federalist*, Hamilton declared that *unity* and *energy* were the requisites of an effective executive.

The idea of the executive council was that there should be three members—one from New England, one from the South, and one from the middle section. Against this scheme, it was contended that the South and Central states would control to the disadvantage of New England, and that a plural executive would result in inefficiency.

The plan of a plural executive council was abandoned, only seven states voting for the single executive.

III. The method of election.

The following plans were proposed to the Convention :

1. Election by the legislature.
2. Election by electors chosen by the state legislatures.
3. Election by popular vote.
4. Election by electors chosen by popular vote.
5. Nomination by popular vote and election by the legislature.
6. Election by electors chosen by the state executive.
7. Election by a committee of 15 of the legislature chosen by lot.
8. Proposal by Richard Spaight of North Carolina that all the electors meet at the National Capitol and elect directly.

The suggestion of Hamilton was that the people in all the communities should vote for a larger number of electors; several thousand of these should get together and elect a smaller number of electors; and the smaller group should meet to elect the President of the United States.

Opposed to the electoral scheme, was the plan to allow Congress to elect the President. It was decided at first to adopt this plan. Shortly this action was reconsidered, and a majority of the Convention voted against it. A return was made to the Congressional method of election. To bring the matter to a conclusion, a motion for the appointment of a committee on the method of elect-

ing a President prevailed. The report of the committee was made on September 4, 1787, when the electoral system was adopted, with nine states favoring and two opposing the plan.

The system adopted was the result of a compromise between the large and small states. Election by the legislature and likewise by the people was feared by all; hence the electoral plan.

IV. The problem of departmental organization.

Mason suggested that the so-called cabinet should consist of six persons, two each from the following regions: New England, the South, and the Central States.

The Constitution provided only for heads of departments. The President is given the power to consult heads of the executive departments as to questions arising in their respective departments. Moreover, control of the Cabinet is further vested in the President, who is charged generally with the exercise of executive power, and in the Congress, which has the right to take the necessary measures to carry out the powers vested by the Constitution in the government.

V. The term of office.

The members of the Convention were of the opinion that the executive should have sufficient time in office to secure results from his administration, and to allow his policies to bear fruit. In addition to *unity*, which meant one executive, and *energy*, which meant an amplitude of powers, a definite tenure of office was required. Seven years was voted as the term of office. Later it was reconsidered, and a four-year term was agreed to. It was agreed that nothing should be said about reelection in the Constitution.

VI. Constitutional qualifications of the President.

The President must be a natural-born citizen of the United States, thirty-five years of age, and must have resided within the United States for fourteen years.

VII. The powers of the President.

Executive powers are set forth in the Constitution. The President's actual achievements are generally determined by his personality, influence, administrative capacity, the strength of his party and his control of it, and his theory of executive power.

A. The legislative or veto power. After both houses shall have passed a bill, it is presented to the President. If he approves it, he signs it. If not, it is returned to the house from which it originated with a statement of his objection. This house proceeds to reconsider, and if approved by two-thirds of both houses it becomes a law. If a bill is not returned by the President within ten days after its presentation, it automatically becomes a law, unless the adjournment of Congress prevents its return. The term "pocket veto" is applied to bills which fail to receive the President's approval and which are not returned to Congress because of the adjournment of that body.

B. Minor powers of the President. The power to consult heads of executive departments as to questions arising in their respective departments gives him constitutional control over the cabinet. Under the right to inform Congress of the state of the Union, he submits his annual and special messages. He gets contact with legislation in exercising the

right to recommend to Congress measures which he may deem wise, expedient and necessary. He issues commissions to officers of the United States. Moreover, he may adjourn Congress in case of disagreement between the two houses, and may convene it in extra session.

C. The power of appointment. Ambassadors, Public Ministers, Consuls, Judges of the Supreme Court, and other officers of the United States, whose appointment is not otherwise provided for, are to be appointed by the President, with the advice and consent of the Senate. Congress may vest in the President alone, in the courts of law or in the heads of departments, the appointment of inferior officers. The President has generally the power of removal without consulting the Senate. Congressional privileges of selecting officers, and party patronage, have limited the President's discretion in appointments.

D. The execution of laws. The constitution states that the President shall "take care that the laws be faithfully executed." Moreover, he takes an oath of office to this effect. This is the most important executive function. Execution of a law of Congress is often limited by the terms of the statute itself. Many quasi-legislative and quasi-judicial duties are conferred upon the President. Execution of laws extends to treaties of the United States. The President has, therefore, a large ordinance power, and much latitude in law enforcement. The President must see to it that the ad-

ministrative officers perform their legal duties, but cannot instruct them as to the methods used. He is the head of the national administration.

E. Commander-in-Chief. The President is commander-in-chief of the army and navy, and of the militia when called into the service of the United States. He may order the army and navy anywhere, if the appropriations will allow. Only Congress may declare war, but the President may, by troop movements, make war inevitable.

F. Power in foreign relations. The President is given the power to appoint Ambassadors and Consuls with the advice and consent of the Senate. He can make treaties with the advice and consent of two-thirds of the Senators present when a treaty is under consideration. He receives Ambassadors from foreign countries. As commander-in-chief, he must repel invasions and carry on war declared by Congress. He has the power of recognition of foreign states and governments. He is the only representative of the nation in dealing with foreign nations. The Supreme Court is voluntarily bound by the President's decision in regard to questions of foreign relations in their nature political.

G. The pardoning power. The President may pardon any one guilty of an offense against the United States before and after either conviction or indictment. Under amnesty, he may pardon a class and make provision whereby persons affected may establish their membership in that class. Under reprieves, he may suspend execution of sentence

for one reason or another. Congress cannot restrict the power of pardon.

VIII. The political position of the President.

In practice, the President is chosen because of the support of a political party. The extra-constitutional development of the office has given to it a position not intended by the framers of the Constitution. The President, representing the whole country, can, through messages, appointments, speaking and writing, public appeal, and the power of veto, control his party, and thus control legislation. President Wilson, by assuming the rôle of party leader while President, contributed an executive leadership in legislation much like that in parliamentary governments.

The office of President entered upon a new and distinct phase under President Roosevelt, who expressed his views of executive power in the following terms:

"The most important factor in getting the right spirit in my administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution, or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all, every executive officer in high position, was a steward of the people, bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such acts were forbidden under the Constitution or by the laws. Under this interpretation of executive power, I did and caused to be done many things not previously done by the Presidents and the heads of departments. I did not usurp power, but I did greatly broaden the use of

executive power. In other words, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct Constitutional or legal prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance."

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CHAPTER XII

THE LEGISLATIVE SYSTEM: THE SENATE AND THE HOUSE OF REPRESENTATIVES

I. Plans for the legislative system.

The *Virginia* plan, presented by Randolph, proposed that the national legislature should consist of two houses, with the members apportioned among the states according to their wealth or population. The *New Jersey* plan, presented by Paterson, suggested a national legislature of one house, representing the states as units in the federal system, where all states, irrespective of wealth, population, or extent of territory, would have an equal voice. Over these two plans for the legislature, the Convention was deadlocked.

II. The Great Compromise of the Constitutional Convention.

Between these opposite points of view, representing the legitimate economic and social interests of the larger and smaller estates, some compromise was necessary. Franklin, mediating generally between conflicting groups, suggested that the lower house be elected according to population and given exclusive power in initiating tax legislation, and that equal representation be prescribed in the upper house, with the understanding that certain exclusive rights be conferred upon it. This plan prevailed. Hamilton favored two houses, one elected by the people, and one elected indirectly. The agreement was in effect that the house should be national and the Senate federal.

III. The Senate.

A. Method of election. It was finally agreed to leave the election of Senators to the state legislatures. This method, it was urged, would have the following results: the states, each electing two senators, would link the states to the nation as cooperating units of a federal system; would give more security to the commercial interests; would operate as a check against the landed interests; and would result in securing men of influence and distinction as senators.

Wilson proposed the popular election of Senators.

B. Length of term. Morris, Madison, and Hamilton discussed the rôle of the Senate. This was closely connected with the term of office. Morris favored a term for life without pay. At first it was agreed that a seven-year term should prevail. This was reconsidered, and the terms of four, seven and eight years were suggested and considered. Finally, upon motion of Wilson, a six-year term was adopted.

C. Special functions of the Senate. It was agreed that the Senate should enjoy these special functions: 1. Advice and consent to appointments by the President of ambassadors, public ministers, consuls, judges of the supreme court, and other officers of the United States whose appointment is not otherwise provided for (the confirmation of appointments). 2. Advice and consent of two-thirds of the Senators present when a treaty is under consideration, to treaties made by the Presi-

dent (ratification of treaties). 3. The trial of impeachments.

D. Devices which were used to check the acts of the more democratic House through a strong Senate:

1. Senators were to be chosen by the state legislatures rather than directly by the voters. In this way their election was removed from popular control.
2. Their term was for six, instead of two years.
3. Continuity of the Senate was to be maintained by the retirement of only one-third of the Senators at one time, and the retention in service of two-thirds of the Senate.
4. Senators were to be 30 years of age.

E. *Constitutional requirements of Senators.* These are:

1. A citizen of the United States for nine years.
2. Not less than thirty years of age.
3. An inhabitant of the state where he is elected.

F. *Representation.* It was agreed that there should be two Senators from each state, and that no state could be deprived of its equal representation in the Senate without its consent.

IV. The House of Representatives.

A. *Method of election.* Gerry was of the opinion that all the evils of the nation had been caused by too much democracy, but the people should have something to say about their government. Pinckney

avored allowing the legislature to select the members of the lower house, because the people did not know how to select their representatives. It was decided, under the Great Compromise, that the house should be national in character, and that the time, place, and manner of holding the Congressional elections should be fixed by the state legislatures. Congress may alter the arrangements of the state legislatures.

B. Length of term. One year was proposed, at first, as the proper term of service. It was later decided that the term of office should be two years, the entire membership being renewed every two years.

C. Special functions of the House. Under the Constitution, the two special functions of the House are:

1. The right to originate all money bills and tax legislation.
2. To prosecute in cases of impeachment.

D. Constitutional requirements of Representatives. To be a representative, one must be:

1. A citizen of the United States for seven years.
2. Twenty-five years of age.
3. An inhabitant of the state where he is chosen.

E. Apportionment of representatives and direct taxes. It was provided that representatives and direct taxes should be apportioned among the several states according to population. The South, lacking a large free white population, and great commercial wealth, which the North possessed, sought to

count the slave population as a basis for representation, and to apportion taxes according to the number of free white inhabitants, rather than according to wealth. It was agreed that three-fifths of the slaves should be counted toward direct taxes and representation, and that all free white persons, including indentured servants, should be counted. It was provided that the number of Representatives should never exceed one for each 30,000 of the population.

Each state is entitled to at least one representative.

F. Suffrage. Morris was of the opinion that only freeholders should vote. Madison declared that the state legislatures were elected by freeholders, with bad results. It was decided that the Representatives should be chosen by the people of the several states, and that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." In brief, the framers of the Constitution adopted the suffrage requirements of the states.

V. Constitutional privileges and limitations of Congress.

A two-thirds vote in each house is necessary to expel a member. A journal must be kept by each house and published. One-fifth of either house can demand a roll call of yeas and nays. Subject to these limitations, the houses elect their own officers, compel attendance of members, and prescribe rules of procedure and discipline.

VI. The powers of Congress.

A. The plans. The Virginia plan proposed to confer upon the national legislature jurisdiction over all

matters not pertaining to the states. The New Jersey plan proposed an enumeration of powers. Hamilton and Madison favored giving to Congress general legislative authority over matters national in character. The majority, fearing the effect of a sweeping grant of powers, insisted on enumerating them in detail.

B. The general powers of Congress, not existing under the Articles. These may be grouped as follows:

1. Taxation. One of the capital defects of the Articles was the impotence of the government of the Confederation in the raising of public revenues. All agreed that money must be raised to meet the expenses of government and to discharge the public debt. It was therefore decided that Congress should have the power to lay and collect taxes, duties, imposts, and excises. These taxes could be collected directly from the citizens without the necessity of acting through state governments.
2. *The regulation of commerce*. The Northern states desired the regulation of international commerce by the federal government. This would centralize authority and simplify regulations, taking the place of state agreements. The Southern states opposed this, fearing protective tariffs against foreign goods, especially English. Both the North and South, after settling the question of the importation of slaves, agreed that tariffs levied by states, and discriminatory duties, should cease. It was eventually agreed that interstate and foreign commerce

should be regulated by the national government. The approval of treaties by the Senate was demanded by the South as a protection against the North.

3. *The national defense.* The members of the Convention were opposed to huge military establishments. Nevertheless, they agreed that the government should have the power to deal effectively with insurrections and invasions, and to prepare for these contingencies. The system of each state furnishing quotas had failed. Direct authority against and over individuals was needed. Hence Congress was authorized to raise and support an army and navy; to make rules and regulations for their government; to provide for the organization, arming and disciplining of the militia in the states; to utilize this militia to enforce the laws, suppress insurrections and repel invasions; to declare war and make rules for captures on land and sea; and to make all laws necessary and proper to carry these powers into effect.
4. *The "Necessary and Proper" clause.* The enumeration of powers by the Constitution was not regarded as a sufficient by the makers of the Constitution. To insure their execution, the Congress was authorized to make all laws "necessary and proper" for carrying into effect any and all of the enumerated powers. This clause was later given an interpretation which greatly expanded the powers of the federal government.

C. The powers of Congress as given in the Constitution.

1. Lay and collect taxes, and provide for the general welfare.
2. Borrow money.
3. Regulate foreign and domestic commerce.
4. Regulate naturalization of aliens.
5. Coin money, punish counterfeiters, and fix the standard of weights and measures.
6. Regulate bankruptcies.
7. Establish postoffices.
8. Grant patents and copyrights.
9. Constitute tribunals inferior to the Supreme Court.
10. Define and punish felonies and piracies on the high seas and offenses against the law of nations.
11. Declare war and regulate captures on land and sea.
12. Raise and support an army and navy.
13. Organize and discipline the militia.
14. Exercise exclusive jurisdiction over a federal district which may become the seat of government.
15. Make all laws necessary and proper for carrying into effect the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any officer or department thereof.

D. Limitations on the powers of Congress.

1. The migration of persons desired by the states could not be prohibited until 1808.
2. The writ of habeas corpus cannot be suspended except where required by the public safety on account of rebellion or invasion.
3. No bill of attainder to be passed.
4. No ex post facto law can be passed.
5. No capitation or other direct tax can be passed except in proportion to the census or enumeration.¹
6. No export tax can be levied.
7. Freedom of preferential commerce and navigation regulations is provided for the commerce of one state as regards the port of another state.
8. All money drawn from the Treasury must be in pursuance of an appropriation made by law, and a statement of public expenditures shall be published from time to time.
9. No title of nobility shall be granted by the United States, and no officer of the United States may accept any emolument title, office or present of any kind from any foreign state or ruler, without the consent of Congress.

¹Superseded by the Sixteenth Amendment.

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CHAPTER XIII

THE JUDICIARY AND THE POWER OF THE COURTS

I. The system of courts proposed.

The advocates of nationalism wanted to write into the Constitution provisions for a Supreme and inferior courts. The provision adopted was a compromise, and was supplemented by a judiciary act passed by the first Congress. Under the Articles, there was no judiciary to require states and citizens to obey the laws of the country. There was a natural fear of giving the control of the judicial system into the hands of the federal government, and of giving the courts a status independent of the legislature. Finally, they agreed to a Supreme Court and such inferior courts as Congress might establish.

II. The Council of Revision under the Virginia plan.

It was proposed to form a council composed of the executive and a certain number of the judges to constitute the veto power. This plan was decisively rejected. The question of giving the court the power to pass upon the constitutionality of laws was not brought up in the Convention.

III. Method of choosing the judges.

This caused much trouble. Virginia suggested election by the legislature. Wilson of Pennsylvania opposed this suggestion on grounds of possible intrigue, and proposed their appointment by the President. Madison suggested their appointment by the Senate. It was the view of

Franklin that the legal profession should select the judges. On July 13, 1787, the Convention unanimously agreed to allow the Senate to appoint the judges. On July 16, an attempt was made to reconsider, and on July 18, it was agreed that the President should appoint the judges with the advice and consent of the Senate.

IV. Term of office.

The life term, or during "good behavior," was favored by a majority of the Convention.

V. Opinions of leading members of the Convention regarding the judicial review of legislation.

This great question has been discussed periodically. During Jefferson's time, the discussion was at white heat. The famous Dred Scott decision led the Republican party to make war on the judiciary, and led to legislation limiting its power. In 1895, there was further criticism on account of the income tax decision.¹

What was the intention of the Convention as to this question? A number of authorities have claimed that judicial review is usurpation of power. The opinion of the legal profession generally is favorable to this right, and to the view that the Revolution strengthened it.

Dr. Charles A. Beard, in his book, "The Supreme Court and the Constitution," has published the results of his research on this subject. Thirteen of the twenty-five leading men expressed the view that the courts would normally pass upon the constitutionality of laws. Three others approved the principle of judicial review by approving the judiciary act of 1789, which act provides methods for bringing questions of constitutionality before the Supreme Court. Of the thirty remaining and

¹See *infra*, pp. 206-208.

less influential members, ten were of the same opinion. According to Beard, at least twenty-six members of the Convention favored the principle, whereas only four are on record as opposing it.

In a book entitled "The Judicial Veto," by H. A. Davis, the position of Dr. Beard is attacked. He discusses some of the men shown by Beard as favoring the principle, and points out their support of the opposite view. He includes such men as Ellsworth and Paterson in his discussion. It is the theory of Dr. Beard that no considerable number of the people had thought much about the question. Until near the end of the eighteenth century, the doctrine of majority rule had not given the people much concern. It was not until the American Revolution, when the first state constitutions appeared, that government was vested in a majority. Following this, the conservative men saw the need of a check upon the legislature. A House of Lords, or other analogous device, was out of the question. Some other device was necessary. The only place to which they could turn was the courts.

The following quotations from *The Federalist* indicate the position of Hamilton on the independence of the judiciary and the right of judicial review:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution,

has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American Constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.—*Federalist*, No. 78 (Hamilton) (Ford's Ed.) 520-523.

There ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention, are prohibited

from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the states.—Federalist, No. 80 (Hamilton) (Ford's Ed.) 531.

VI. Extent of organization under the Constitution.

Judicial power is vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish. The Constitution provides that the judges of the Supreme Court must be nominated by the President and appointed by and with the advice and consent of the Senate.

VII. Extent of judicial powers; jurisdiction of the Supreme Court.

A. Judicial power, as regards certain *persons* and *parties*, extends under the Constitution to cases affecting Ambassadors, other public Ministers and Consuls; controversies to which the United States is a party; controversies between two or more states; between a state and citizens of another state¹; between citizens of different states, and between a state and the citizens thereof and foreign states, citizens or subjects. As regards certain *matters*, judicial power extends, regardless of

¹Under the eleventh amendment, an American state cannot be sued by American citizens or by citizens of foreign states.

the character of the parties involved, to all cases in law and equity arising under the Constitution, the statutes, and the treaties of the United States, and to all admiralty and maritime cases.

- B. The *jurisdiction* of the Supreme Court is original in cases affecting Consuls, Ambassadors, and other Public Ministers, and in cases in which a state may be a party. In all other cases, the jurisdiction of the Supreme Court is appellate, both as to law and fact, except as altered by the Congress.

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CHAPTER XIV

THE SLAVERY QUESTION IN THE CONVENTION

I. Opinions of representative members regarding slavery as an institution.

Gouverneur Morris declared slavery to be a nefarious institution, and advocated a tax to raise revenue to be devoted to buying out the slave holders. *Mason* of Virginia, agreed with *Morris* and declared that slavery discouraged manufactures and arts. *Charles Pinckney* defended slavery on historical grounds. *Rutledge* said slavery was a question of interests, and not one of morality or religion. *Ellsworth* thought that slavery would in time naturally disappear, due to the non-slave-holding poor whites, who would be injured by it. *Sherman* of Connecticut thought that slavery would disappear. *Gerry* did not want slavery as an institution sanctioned by the Constitution, hence the term "slave" or "slavery" does not appear in the instrument. In this manner the framers sidestepped a vital and controversial issue.

II. Inter-state rendition.

Under the Articles, provision was made for the return of fugitives. Under the Constitution, a person charged with treason, felony, or other crime, fleeing from justice and found in another state, must be returned to the jurisdiction of the crime upon demand of the executive authority of the state from which he fled. Moreover, a person held to service or labor under the laws of a state, and escaping to another, could not be discharged from his

service under the laws of the state to which he fled, but must be delivered over, upon demand, to the party entitled to his service. This provided for the rendition of fugitive slaves and bond-servants.

III. The regulation of commerce.

This was a dispute between the commercial and agricultural regions. The regulation of foreign commerce by Congress was not agreed to by the South until certain concessions or compromises had been made regarding the slave trade, and the questions of representation and direct taxes in relation to the slave population. Since treaties were to be the supreme law of the land, taking precedence of state constitutions and laws, the South insisted upon their ratification by two-thirds of the Senators present, as a protection against the treaty-making power.

IV. The question of the importation of slaves.

Virginia and Maryland opposed the importation of slaves on the ground that the natural increase was more than sufficient. South Carolina and Georgia were in favor of further importations. The North desired a definite provision forbidding the importation of slaves. It was decided that the Congress should not forbid the importation of such persons as any of the states then existing might think proper to admit prior to the year 1808, but a duty not exceeding ten dollars for each person might be levied.

At a later time the courts of Great Britain undertook to enforce against American ships American municipal law forbidding the slave trade.

V. The apportionment of representatives and direct taxes.

In the matter of counting negroes as people in the *apportionment of taxes*, the North took the position that slaves were people, and therefore should be taxed. The South argued with effect that money was spent in the South for slaves just as it was spent in the North for manufacturing establishments. The taxing of slaves, therefore, would mean the taxing of purchases in the North. In the matter of counting negroes in the *apportionment of representatives in Congress*, the South argued that the North declared the slaves to be people, therefore they must be counted. The burden of the Northern argument was that the South denied that slaves were people but property bought with a price.

On both of these points, a compromise was necessary. On motion of Wilson, slaves were to be counted to the extent of three-fifths, for purposes of representation and taxation.

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CHAPTER XV

LIMITATIONS ON THE POWERS OF THE STATES

I. Proposals under the different plans.

The Virginia plan proposed giving the states a veto power. Another plan was to control the states by the veto power of the national government. Still another plan was to have the governors appointed by the national government. It was generally agreed, however, that Congress should exercise exclusively the ordinary sovereign powers requisite to the maintenance of membership in family of nations, and that certain limitations must be placed upon the states, in addition to positive grants of power to the Congress, which would prevent state legislatures from paralyzing the national government.

II. "Bill of Credit" clause.

The case of the debtor and his relief occupied the state legislatures. Many favored the relaxing of the administration of justice and affording facilities for the payment of debts. As a result, the state legislatures passed laws providing for the issue of paper money, in order that debtors might easily discharge their obligations. It was provided in the Constitution that no state should emit bills of credit or make anything but gold or silver legal tender in the payment of debts.

III. "Obligation of Contract" clause.

It was also thought that compliance with contracts should not be rigidly enforced. Consequently, some states

passed laws suspending collection of debts, authorizing debtors to pay their obligations with land or personal property, repealing the charter of a college and taking its management from the trustees appointed by law, and had interfered generally with the enforcement of private agreements. The Convention introduced a provision prohibiting states "to impair the obligation of contracts." This clause is not fully explained in the debates. It probably was meant to prevent a state from repudiating its own contracts rather than to regulate private contracts. Later, Marshall interpreted the clause as applying to private contracts, and in this way gave the Supreme Court jurisdiction over a multitude of local questions.

IV. Suppression of domestic insurrections.

An uprising in Massachusetts raised the question of the protection of state authorities in case of revolt. An army and navy and militia were provided for, and the President, upon the application of the state legislature, and, if not in session, the governor of the state, may send troops to suppress domestic insurrections. Moreover, each state is guaranteed a republican form of government.

V. Supremacy of federal law and judicial control.

To provide for the supremacy of federal laws, both as regards positive grants of power and limitations upon the states, and to provide for their effective enforcement, it was provided that "this Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state

shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is further provided that members of the state legislatures and executive and judicial officers of the several states shall be bound by oath or affirmation to support the Constitution of the United States.

VI. Other constitutional limitations upon the states.

- A. States cannot levy and collect imposts and duties upon exports and imports.
- B. States cannot levy a tonnage tax without the consent of Congress.
- C. A state may not seriously interfere with interstate commerce.
- D. A state has no power over the fiscal system.
- E. No state may pass a bill of attainder or *ex post facto* law.
- F. No state shall make or enforce any law which may abridge the privileges or immunities of citizens of the United States.
- G. No state may deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

VII. Privileges of the states.

- A. The states are guaranteed a republican form of government.
- B. The states are to be protected against invasion and domestic violence.

- C. No state may be divided or joined with one or more states without the consent of the legislatures of the states concerned and of the Congress.
- D. Nothing in the Constitution can be construed as prejudicing any claims of any particular state.
- E. All powers not delegated to the federal government are reserved to the states or to the people.
- F. No state may be deprived of its equal representation in the Senate without its consent.

VIII. Views of the founders.

Madison argued consistently that the Convention was called for the purpose of checking the legislatures of the states. Washington maintained that the main subject for consideration was the establishment of national credit. Hamilton agreed with both, as one was concerned with the end of the Convention, and the other with the means to that end.

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CHAPTER XVI

QUESTIONS OF RATIFICATION AND AMENDMENT

I. The Convention abandoned the principle of unanimous approval of the Constitution.

Under the Articles of Confederation, it was provided that a perpetual union was being formed, and that this union could not be changed without unanimous consent. For this reason, Professor Burgess has declared that there is no connection between the Articles of Confederation and the Constitution of the United States. In his opinion the Constitution is a revolutionary document, and a distinct break from the old system.

It was agreed that the approval of nine states would constitute a ratification.

II. Method of ratification.

The appeal to state conventions instead of to the state legislatures was also regarded by some as revolutionary. This method of ratification was chosen primarily through fear that the state legislatures might refuse their consent. The Congressional resolution calling for the Convention expressly limited the powers of the delegates to that of rendering the Articles adequate, and of submitting their results to Congress for agreement and to the states for confirmation. These limitations were in general confirmed by instructions of the states to their delegations. None of these limitations were observed.

Reasons for adverting to state conventions for ratification:

- A. State legislatures had always opposed amendments to the Articles of Confederation.
- B. The politicians of the state legislatures would oppose the establishment of higher dignitaries over them, and would refuse to give up their privileges under the Articles, of which they would be divested by the Constitution.
- C. By concentrating the attention upon the election of delegates to the state conventions, men would be selected who would be more favorably disposed to the Constitution.
- D. Popular ratification through conventions popularly elected would give more strength and support to the Constitution.
- E. A legislature might rescind its action, whereas a Convention, meeting temporarily, would dissolve or adjourn.
- F. The bicameral character of the state legislatures would tend to delay legislation. Moreover, state conventions would not be burdened with ordinary state legislation, and would have all the advantages of a special body.
- G. So complete a change in the government as compared with the Articles of Confederation justified as completely a different method of ratification.

III. The amending process.

The early state constitutions made no provision for amendment. The Articles were to be amended by the submission by Congress of a proposal and its unanimous ratification by the states. The Virginia plan proposed that

some means should be provided that amendments might be made without the intervention of Congress. Pinckney thought the perfection of the instrument did away with the necessity of ratification. The Committee of Detail proposed that on petition of two-thirds of the state legislatures, the Congress should call a convention. Hamilton is responsible for the present plan, with the aid of Madison. The advocates of the small states wanted the states to initiate amendments. The nationalists favored the other system. This explains the different methods.

How is the Constitution amended? Four methods are authorized by the Constitution:

- A. Proposal by two-thirds of both houses of Congress and ratification by three-fourths of the state legislatures.
- B. Proposal by two-thirds of both houses of Congress, and ratification by three-fourths of the states in conventions, called for that purpose.
- C. Proposal by a national convention called by Congress at the request of two-thirds of the state legislatures, and ratification by three-fourths of the state legislatures.
- D. Proposal by a national convention called by Congress at the request of two-thirds of the state legislatures, and ratification by three-fourths of the states in conventions called for that purpose. Either method of proposal may be followed by either method of ratification.

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CHAPTER XVII

THE CONTEST OVER RATIFICATION

I. Transmittal to Congress.

The instrument was sent to the Congress of the Confederation on September 17, 1787, with the request that it be submitted to the conventions of the states through the state legislatures. It was therefore an indirect process—from the Convention to the Congress; from the Congress to the state legislatures; from the state legislatures to the people; from the people to the conventions. On September 28, the Congress under the Articles of Confederation, then meeting in New York, voted to refer the proposition to the states for ratification.

II. Objections advanced to the ratification of the Constitution.

- A.* There was no Bill of Rights included in the Constitution.
- B.* The supporters of the states and their rights were upheld by such men as Patrick Henry.
- C.* The small agricultural interests and the pioneering element thought that the commercial interests had been unduly favored.
- D.* The state legislatures resented the divesting of their privileges.
- E.* The people interested in paper money opposed the sections of the Constitution relating to this subject.

- F. Many opposed it because the delegates had violated their instructions in the kind of the instrument offered and the method of ratification proposed.

III. Ratification by the States.

- A. *New York*. In this state, suffrage requirements were entirely swept away and delegates were elected to the convention under manhood suffrage. Under the instructions to the delegates, it appeared that 23 favored ratification, and 41 were opposed. The leading proponents were Hamilton and Jay, of *Federalist* fame, while the opposition was led by Governor Clinton, Lansing, and Yates.

The *Federalist* had already exercised a profound influence, and now it was turned to good account in New York. Eight states had ratified, and the Virginia and New Hampshire conventions were in session when the New York convention met. After the Federalists and anti-Federalists had engaged in heated arguments, the instrument was ratified by a majority of three votes, 30-27.

- B. *Massachusetts*. The towns elected delegates on October 20, 1787. On January 9, 1788, the convention met, and a majority was opposed. The convention voted by regions as follows: Coast section, 73% for and 27% against; middle section, 14% for and 86% against; the western district, 42% for and 58% against. However, this position was reversed and the Constitution was ratified on February 7, 1788, by a vote of 187-168.

- C. *Virginia*. The Constitution was opposed chiefly by Patrick Henry, George Mason, Richard Henry

Lee, and James Monroe. It had the distinguished support of George Washington, James Madison, John Marshall, and Governor Randolph. The convention assembled on June 2, 1788. The unit of representation for delegates was the county. The people in the territory now comprising the states of West Virginia and Kentucky, then in Virginia, were opposed to the Constitution. On the west the counties were large, and the smaller counties of the east controlled the Convention. Only freeholders were allowed to vote for delegates. The percentage of votes, according to regions, was as follows: Tidewater, 80% for and 20% against; Piedmont, 24% for and 76% against; West, 97% for and 3% against. The instrument was ratified on June 25, 1788, by a vote of 89 to 79.

D. Pennsylvania. Here, the battle was bitter. On the morning of September 28, when the Congress voted to submit the instrument to the states, the Federalists in the state legislature at Philadelphia proposed the election of delegates to the state convention at once. The opposition claimed that the Constitution had not yet come before them. On the next day, the news of submission by Congress reached Philadelphia. Those opposed to the Constitution attempted to stay away, but were forced by a mob to attend, and the call for the convention was issued. There were about 75,000 taxpayers in Pennsylvania, but only about 13,000 votes were cast for delegates, due to ignorance of the election, indifference, or opposition. Opposition to the Convention came mainly from the in-

terior, although the town of Pittsburgh, with 400 people, favored the Constitution. The Constitution was ratified on December 12, 1787, by a vote of 46 to 23.

E. Delaware. Here, after a short debate of three days, there was, on December 6, 1787, a unanimous ratification.

F. New Jersey. After the election of the convention in November, 1787, there was a unanimous ratification on December 18, 1787.

G. Connecticut. The convention was elected November 12, 1787; convened January 3, 1788; and the Constitution was ratified on January 9, 1788, by a vote of 120 to 40.

H. Maryland. The convention met in April, 1788, with Luther Martin as the chief opponent of the Constitution. On April 26, 1788, the Constitution was ratified by a vote of 63 to 11.

I. Georgia. The convention met in January, 1788, and unanimously ratified on January 2.

J. South Carolina. The convention contained a majority of delegates from the east. The convention ratified the Constitution on May 23, 1788, by a vote of 149-73. The regional vote was: Coast district, 88% for and 12% against; Interior, 49% for and 51% against.

K. New Hampshire. The Constitution was distributed for purposes of discussion. In the convention the contest, as in Pennsylvania, was between the Federalists and the anti-Federalists. The convention

was postponed, and the Constitution was ratified in June.

L. North Carolina. The convention adjourned without ratification. The instrument was eventually ratified on November 21, 1789.

M. Rhode Island. The people of this state had rejected the Constitution upon its submission. On May 29, 1790, Rhode Island ratified the Constitution.

IV. Defense of the Constitution.

The opposition to the Constitution caused distinguished leaders, seeking only the good of the country, to defend it. The leaders in the defense were Hamilton, Madison, and John Jay, who wrote a series of articles for the newspapers discussing and explaining, with keen insight and irresistible logic, all provisions of the Constitution and their application. It was later published in book form and called *The Federalist*. Other than the Constitution, it has taken front rank among books on American political literature. The support of these men, and of many less able and less distinguished, but thoroughly as sincere, saved the states from disintegration and dissolution, and restored respect for the country abroad.

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LIBBY, O. G.—*The Geographical Distribution of the Vote.*

CHAPTER XVIII

THE OPERATION OF THE CONSTITUTION UNDER THE REGIME OF THE FEDERALISTS

I. The judiciary act of 1789.

Under this act six justices for the Supreme Court were created. A system of inferior courts, authorized by the Constitution, was established, consisting of 13 district courts and 3 circuit courts, and their jurisdiction was defined. Provision was made for appeals from the decisions of state courts to federal courts by Section 25 of the act. This act gave practical application to the intent of certain leaders to establish the supremacy of the courts.

II. The tax and financial proposals of Alexander Hamilton; Opposition by Thomas Jefferson.

A. Funding the national debt. Hamilton gave his attention to the national credit in a celebrated paper called a *Report on Public Credit*, dated January 9, 1790. On January 14, he submitted his plan for funding the national debt. The debt was divided as follows: Due foreign creditors, \$11,710,378; due domestic creditors, \$42,414,085; floating debt, \$2,000,000; making a grand total of \$56,124,463. Hamilton's proposal was that all old bonds, certificates of indebtedness, and other promises to pay, issued by the Congress since the beginning of the government should be called in. These obligations should be consolidated, forming a single debt against the credit of the United States.

New bonds should be issued to the holders of the old obligations, drawing a fixed rate of interest. This, in the opinion of Hamilton, would restore the national credit, and confidence in it at home and abroad. He also insisted that the outstanding obligations, both national and state, should be redeemed at face value, rather than a small amount above the market price.

This measure was adopted by the Congress.

- B. Assumption and funding of state debts.* He recommended that the national government take over \$18,271,786 in debts of the states. It was a debt, he argued, incurred for the good of all in the prosecution of the Revolution, and should be paid by all. Moreover, it would cause public creditors to look to the federal government for meeting their claims, and thus strengthen the position of the government. Again, the power of the states to tax had been taken away, and the government should in justice pay what they owed at the time.

The measure was opposed by the South as an invasion of rights of the states, and as a measure to satisfy Northern speculators who had bought Southern bonds at low prices, anticipating the assumption and funding process. The New England states resorted to radical measures in support of the bill. Tied to this was the matter of locating the national capital. After a bitter contest, it was agreed that the bill should pass, and that the capital should be located on the banks of the Potomac, after a ten-year location in Philadelphia.

C. *The report on excises.* This report was presented on December 13, 1790. It proposed a tax on distilled liquors, chiefly to raise revenue to pay interest on the funded debt. Moreover, the power of the federal government would be felt all over the republic. Much of the spirits was made by farmers and pioneers in their homes. To prevent the invasion of their homes and stills by federal officers, a revolt took place among the inhabitants of certain districts of Virginia, Pennsylvania, and North Carolina. Washington, to prevent the nullification of the law, sent troops into these districts, and the "Whiskey Rebellion" collapsed.

D. *The Bank of the United States.* In a report to Congress, December 13, 1790, Hamilton proposed the establishment of a United States Bank. He argued that it would provide for the issue of stable currency; would be a medium for selling government bonds; would offer a safe and cheap means of exchange; and would be a safe place to care for government funds. Jefferson attacked the proposal on grounds of constitutionality, of its monopolistic character, and of its competition with state banks.

Washington favored Hamilton's proposal, and the bill was passed in 1791. It was created under the "general welfare clause," the charter to run for twenty years (1791-1811), with a capital stock of \$10,000,000, the government to own two millions of the stock. Three-fourths of the stock should be in new six per cent federal bonds, and one-fourth in specie. Paper money could be issued under certain conditions.

E. *The Protective Tariff.* Hamilton's celebrated *Report on Manufactures* was submitted December 5, 1791. It was, in effect, a suggestion that a protective tariff should be levied for the protection of American industries. It would, he declared, encourage the building of factories; create a home market for farm and plantation products; would double the security of the country in war-time by establishing its economic independence in times of peace; would provide labor for women and children, otherwise idle or working part-time; it would increase trade between the North and South, and through this contact, strengthen the union and political ties.

This policy was adopted in part in 1792, and has become increasingly the policy of the United States as regards the tariff.

F. *The opposition of Jefferson.* The successful measures proposed by Hamilton met the determined opposition of Jefferson. He opposed the bank, the tariff, and Hamilton's financial measures generally. In 1794, Jefferson resigned as Secretary of State, and retired to assume the leadership of the growing opposition to the Federalist regime, and to break down its effectiveness through political action. Hamilton believed that the country should be a great commercial and industrial nation. Jefferson feared industry, great riches, and their attendant evils. He believed the agricultural classes to be the foundation of the republic, and in time became the champion of individual rights against the interference of the government, and of the freedom of speech, of the press, and of public

assembly. Between the two there was a wide gulf fixed, which could be bridged only by the action of the people through political means. In the years to come, the Constitution had to yield to the interpretations of one or the other of these great, but different, leaders.

III. The President and the Senate.

Washington held the view that the Senate was an advisory council to the executive, especially in the consideration of treaties and appointments. After failing to secure favorable action on a treaty presented and explained to the Senate in person by himself and the Attorney-General, he declared that he would never visit the Senate again in person. At first a majority of the Senate were former members of the constitutional convention, and it rapidly assumed the role intended by that body. At the outset its meetings were secret.

IV. The Cabinet.

This was an extra-legal body, as the Constitution provided merely that the President shall consult the heads of departments. Washington adopted the practice of regarding the heads of departments as a collective body. Washington chose the following men as members of his Cabinet: Alexander Hamilton as Secretary of the Treasury; General Knox, head of the War Department; Edmund Randolph, Attorney General; and Thomas Jefferson, Secretary of State.

V. The veto power.

This power was not regarded in a narrow sense, but was exercised with the intent of the framers in mind, as a check upon the legislature.

VI. The Third Term doctrine.

Washington set the precedent for only two terms for the Presidency, but he did not believe in its strict application. The real author of the idea as a doctrine was Jefferson.

VII. The power of removal.

This question arose in the first Congress. The question was whether or not the Senate should intervene in the case of removals from office by the President. It became established that the power of removal was inherent in the President without the consent of the Senate.

VIII. Leading decisions of the Supreme Court on points of constitutional law during the Federalist regime.

A. Hayburn's Case, 1792 (2 Dallas, 409). Circuit judges under an act of Congress, were authorized to decide cases involving applications for petitions. The decisions of the circuit justices were subject to review by the Secretary of War and the Congress. The petition of one William Hayburn was received by the Pennsylvania circuit court, where the justices denied the petition and refused to act under the law. The court was of the opinion that the act conferred upon the courts duties which were clearly non-judicial, and not included in the judicial power as described in the Constitution. Moreover, the independence of the judiciary, a cardinal principle with the framers of the Constitution, would be seriously impaired by a right of review conferred upon an executive officer or the legislature.

This is claimed to be the first case where a court has declared an act of Congress unconstitutional.

- B. *United States v. Yale Todd* (13 Howard, 52). Yale Todd instituted a suit under the same act of Congress in February, 1794. In a note appended to the case of *United States v. Ferreira* (13 Howard, 52), by the federal reporter, on authority of Chief Justice Taney, it appears that the Supreme Court held the act of 1792 unconstitutional on the ground that the power conferred by the act was not judicial power, and that the judges could not act as commissioners in administering the acts of Congress. According to writers on constitutional history and law, the decision of complete unconstitutionality was not made.
- C. *Vanhorne's Lessee v. Dorrance* (2 Dallas, 304). The assembly of Pennsylvania passed what was known as the quieting and confirming act. It was claimed that the law interfered with the "natural, inherent, and inalienable right of private property." After a charge to the jury indicating the positions of the legislature and the courts under the Constitution, upholding a constitutional principle against a legislative act which impugns it, and commenting upon the sacredness of the right of private property as guaranteed by the Constitution, the jury was instructed by Justice Patterson to regard the Pennsylvania act as unconstitutional.
- D. *Hylton v. United States* (3 Dallas, 171). The Supreme Court of the United States held that an act levying a tax on carriages was not a direct tax, and therefore not governed by the provision that direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the

enumeration provided for. The act was therefore held to be constitutional.

E. Calder v. Bull (3 Dallas, 386). In the year 1798, an effort was made to test the legality of a retroactive law of the Connecticut legislature. It was the opinion of the court that it had no jurisdiction of the question whether or not a law of the state legislature in conflict with the state constitution was void. The court declined to state whether or not the court could declare void an act of Congress in conflict with the Constitution of the United States. On the other hand, it was stated that a law would be declared void only in very clear cases.

F. Cooper v. Telfair (4 Dallas, 14). The legislature of the state of Georgia had passed several acts expelling certain men from the state and confiscating their property. The constitutionality of the statute was raised on appeal from the circuit court of the United States for the District of Georgia to the Supreme Court. It was claimed that the statutes were in conflict with the constitution of Georgia, and hence void. Both the circuit court and the Supreme Court refused to declare the laws invalid. The justices, while not taking a definite position on one side or the other, were generally of the opinion that the validity of laws should be generally presumed, unless the contrary is clearly shown.

The cases before the federal courts during the Federalist regime disclose a reluctance on the part of the justices to take a positive stand on the right

of the courts to pass upon the constitutionality of laws of Congress, or of state laws. It remained for John Marshall to establish this principle as a definite practice of the American judicial system.

IX. The Virginia and Kentucky resolutions.

A. The Alien and Sedition Acts. These acts were passed soon after the election of John Adams as President. The Alien act authorized the President to expel from the country, or to imprison, any alien whom he regarded as dangerous, or had any reasonable grounds to suspect of "any treasonable or secret machinations against the government." The Sedition act was designed to punish those who attempted to incite unlawful combinations against the government, and those who wrote, uttered or published any false, scandalous, and malicious writing against the government of the United States or either House of Congress, or the President of the United States, with the intent to defame the government, or to bring one or all parts of the government into contempt or disrepute. The Alien act, while not enforced, offended the Irish and French, who opposed in the United States the policy of the government toward Great Britain. The Sedition act was enforced, with the result that there were a number of Republican editors and campaign speakers jailed or heavily fined for caustic, though harmless, criticism of Adams and his Federalist policies.

B. The resolutions. Thomas Jefferson, sensing the discontent due to the Alien and Sedition Acts, drew up the following resolution, which was adopted

by the Kentucky legislature and signed by the governor, in 1798:

“Resolved, That the several states comprising the United States of America are not united by the principle of unlimited submission to their general government, but that by compact under the style and title of a Constitution for the United States, and amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each state to itself the residuary mass of their right to their own self-government, and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each state acceded as a state, and is an integral party; that this government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode, as measure of redress.”

In Virginia, Madison led a movement against the Alien and Sedition laws. The legislature passed resolutions declaring the acts unconstitutional, and asking the states to take proper means to protect the rights of the states and of the people.

C. *The answers of the Federalists in other states.*
Other state legislatures to which these resolutions had been submitted, declared them as encouraging

interference with the central government and that they should be discouraged. Rhode Island was of the opinion that the constitutionality of statutes should be tested by the federal courts exclusively, and by the Supreme Court finally. Massachusetts replied that the decision of cases arising under the Constitution and the construction of laws made in pursuance thereof were vested by the people in the federal courts. The answers in general were opposed to the resolution and favorable to the doctrine of judicial supremacy.

While the people, in the election of 1800, decided against the policy of such acts, the Supreme Court was to become in increasing degree the judge of the validity of acts of Congress, and not the states.

X. Foreign affairs.

During the Federalist regime, the foundations of American foreign policies were laid. Under Jefferson, as Secretary of State, the American policies of neutrality, non-intervention, and the *de facto* recognition of foreign states and governments were coincident with the first proclamation of neutrality, the reception of Edmund C. Genêt as Minister of the French Republic, and the refusal of this government either to suspend the treaties of alliance and commerce with France, or to go into the war on the side of France. While Jefferson sympathized with the aims of the revolution, he maintained a fair and strict neutrality. He did not, however, favor the commission of acts which France regarded as unfriendly. Hamilton sympathized with Great Britain, and urged the non-recognition of France, practically on

grounds later championed by the Holy Alliance; the suspension of the treaties; and only a qualified reception of the French Minister, if any.

The resignation of Jefferson as Secretary of State gave the control of foreign affairs into the hands of the Federalists exclusively. The Jay treaty was negotiated with Great Britain, settling the points at issue over neutrality and neutral rights, and definitely fixing the status of the United States as a neutral in relation to the conflict. Certain points of dissatisfaction were not mentioned in the treaty. Jefferson declared the treaty as an alliance between England and the Anglo-men in this country against the people and the legislature. The House of Representatives, hostile to the treaty, called upon the President for the papers dealing with the treaty negotiations. Washington refused, on the ground that the House had no share, under the Constitution, in the treaty-making power.

During the remainder of the Federalist regime and after, our foreign relations were concerned chiefly with the problem of protecting our neutral rights on the high seas.

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PART II

Oct 1881

THE DEVELOPMENT OF THE AMERICAN CONSTITUTIONAL SYSTEM

CHAPTER XIX

MARSHALL'S GREAT DECISIONS: CONSTITUTIONAL LIMITATIONS ON THE STATES

I. Note on the life of John Marshall.

John Marshall, the son of Thomas and Mary Marshall, was born on September 24, 1755, in the southern part of what is now Fauquier County, Virginia, in a tiny log house. Thomas Marshall was "a man of the soil and the forests." Marshall said of his father: "My father, Thomas Marshall, was the eldest son of John Marshall, who intermarried with a Miss Markham, and whose parents migrated from Wales, and settled in the county of Westmoreland, Virginia, where my father was born." His mother, who was Mary Randolph Keith before her marriage, was well born and well educated. "My mother," wrote Marshall, "was named Mary Keith. She was the daughter of a clergyman, of the name of Keith, who migrated from Scotland and intermarried with a Miss Randolph, of James River."

John Marshall's early education was such as the frontier community in which he lived could afford. There were no schools within reasonable distance, so he was content with such teaching as his parents could give. The meagre fire-side library was devoured by the eager youth. This was supplemented by the Lord Fairfax library. Later, he enjoyed the instruction of a young minister, James Thompson. When an American edition of Blackstone's commentaries was published, Marshall's father was one of the first subscribers. Thomas Marshall intended that his son should

be a lawyer. He sent John to the "academy" of the Reverend Archibald Campbell, a sound, classical scholar, for a brief period.

Marshall had received careful military instruction from his father. When the Revolution broke out, he drilled the youths of his community, and later became a lieutenant in the line, and in 1776 was promoted to Captain-Lieutenant. He served with distinction in the following engagements: The Brandywine campaign, Germantown, Valley Forge, Monmouth, Stony Point, and Pawles Hook. At Valley Forge, he was appointed deputy judge advocate in the Army of the United States. In this capacity he gained invaluable judicial experience.

In 1780, Marshall attended the law lectures of Professor George Wythe at William and Mary, for the short period of six weeks. He took an indifferent interest in the college debating society, and was elected a member of Phi Beta Kappa. His first academic interest was the law lectures, but his mind was constantly distracted from his first business by thoughts of his sweetheart, whose name he wrote in different places among his law notes. Bent on marriage, he left college, procured a license to practice law, signed by Thomas Jefferson, then Governor, and began his legal career. "In January, 1783," wrote Marshall, "I intermarried with Mary Willis Ambler, the second daughter of Mr. Jacquelin Ambler, then Treasurer of Virginia, who was the third son of Mr. Richard Ambler, a gentleman who had migrated from England, and settled at Yorktown, in Virginia."

Marshall's career at the bar and in the public service is fairly well known. He became an acknowledged leader of the Virginia bar, and served in the Virginia legislature and Council of State. As a member of the Virginia Convention on Ratification, he engaged Patrick Henry in debate,

and aided in the ratification of the instrument which he, more than any other man, was destined to interpret and apply.

With the Constitution ratified, Marshall became the leader of the Virginia Federalists, and the defender of George Washington and his administration. He enjoyed by this time a lucrative practice. In 1797, he was appointed minister to France with C. C. Pinckney and Francis Dana. The outcome of this mission, commonly called the "X, Y, Z affair," did not distinguish Marshall as a negotiator, although he and Pinckney followed the only honorable course. He was elected a member of Congress in 1798, and entered upon his duties December 2, 1799. In Congress, he was a strong defender of John Adams and the Federalists. He was appointed Secretary of State, and served in this capacity for a brief period only. On January 20, 1801, he was nominated Chief Justice of the United States by President Adams, and was confirmed by the Senate on January 27. The seal of the United States was affixed to his commission by Samuel Dexter, Secretary of War, as executing the office of Secretary of State *pro hac vice*. Marshall continued to serve as Secretary of State until the end of Adams' administration. On March 4, 1801, as Chief Justice of the United States, he administered the oath of office to his distinguished protagonist, Thomas Jefferson. What thoughts passed through their minds as they faced each other on this solemn and significant occasion, is known only to the Supreme Being. Certain approximate deductions might reasonably be drawn.

Probably the most brilliant contribution to American legal literature in a generation is the four volumes on "The Life of John Marshall," by the Honorable Albert J. Beveridge. It should be read by every American citizen, not only for the light it sheds on the Constitution and the

life of its greatest expounder, but also for an eloquent illustration of the rise of an American youth from comparative poverty to a position of high authority under a system of government which this master-builder so magnificently helped to mould.

II. *Fletcher v. Peck* (6 Cranch, 87).

This case involved the meaning of the contract clause: "No state shall . . . pass . . . any law impairing the obligation of contracts." This clause was inserted toward the end of the Convention. On August 28, 1787, King proposed a prohibition on the states interfering with private contracts. In the opinion of Madison, a general prohibition, rather than a specific one, should be laid on the states. Rutledge, of South Carolina, suggested a provision prohibiting retrospective laws. The Constitution was sent to the Committee of Style, without a provision on this point. When it was returned, it contained a prohibition on state legislatures to impair or alter contracts. The wording was slightly changed to its present form. One of the most important clauses was adopted in this manner with little debate.

Facts. In 1795, a land company secured from the Georgia legislature 45,000,000 acres of land for a consideration of \$500,000. The contract for the purchase was in the form of a bill passed by the state legislature. It was claimed that the sale was effected through bribery, and the law was repealed by the state legislature. Peck, claiming title under the original grant, brought suit in the federal courts to uphold the contract of the state legislature.

Arguments. Counsel for the plaintiff made the following points:

1. The Georgia legislature had no right to sell the land.
2. The grant was void on account of fraud.
3. The state of Georgia rescinded the act.
4. The land belonged to the United States.

Counsel for the defendant set forth these points:

1. The state of Georgia had authority to sell the land.
2. Peck was innocent of any crime or wrong.
3. Peck was ignorant of any fraud in connection with the grant.
4. The land was owned by the state of Georgia.

Marshall's opinion and the decision of the Court:

1. Is the legislature of Georgia competent to annihilate the title vested in Fletcher, and to resume the property? The principle that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the rights of a succeeding one, is generally sound. But when a law is in its nature a contract, and when absolute rights have been vested under it, a repeal of the law cannot divest those rights. "The past cannot be recalled by the most absolute power."

2. What is a contract? Is a grant a contract? A contract is a compact between two or more parties, and may be executory, in which a party binds himself to do or not to do a particular thing, or executed, in which the object of contract is performed. A grant has the same elements, and in its own nature amounts to the extinguishment of the right of the grantor, and implies a con-

tract not to reassert that right. One is, therefore, estopped by his own grant.

3. Does a grant come within the meaning, and this case within the scope, of the provision of the Constitution that no state shall pass any law impairing the obligation of contracts? A grant being a contract executed, and the words of the Constitution being general, and hence making no distinction as to kinds of contracts, is within the meaning of the provision.

4. If grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? The general terms being used, contracts of all descriptions are embraced, including grants made by the state, and to which it is a party. "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."

5. Does the rescinding act have the effect of an *ex post facto* law? Yes, because it forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased.

6. Does the case come under the operation of the "impairment of contract" clause? The state of Georgia was restrained from passing a law impairing the purchase of the land, since the estate passed into the hands of the purchaser for a valuable consideration, and without notice of fraud.

III. Dartmouth College v. Woodward (4 Wheaton, 518).

Facts. In 1769, one Rev. Eleazer Wheelock, having organized a school for religious instruction among the Indians, and desiring to establish in New Hampshire an institution to promote learning among the English, applied to the Crown for a charter, which was granted, incorporating the twelve persons mentioned therein by the name of "The Trustees of Dartmouth College," and granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, the governing board of the college, to fill all vacancies which might take place in their own body.

Under three different acts of the New Hampshire legislature, the charter was altered. The act of June 27, 1816, entitled, "An act to amend the charter and enlarge and improve the corporation of Dartmouth College," increased the number of trustees to twenty-one, gave the appointment of additional trustees to the governor, and created a board of overseers, consisting of twenty-five persons, with power to inspect and control the most important acts of the trustees. Certain state officials of New Hampshire and Vermont were made members *ex-officio*. Other members were to be chosen by the Governor and Council of New Hampshire, who were to fill all vacancies as they occurred.

The majority of the trustees having refused to accept the amended charter, brought suit for the corporate property held by Woodward under the acts of the New Hampshire legislature. The Superior Court of Judicature of New Hampshire rendered a verdict for the defendant, which judgment was brought before the Supreme Court by writ of error

Decision of the Court, and Marshall's opinion:

1. Is the charter a contract? In this transaction, every ingredient of a complete and legitimate contract is found. A charter is applied for, having as its object the incorporation of a religious and literary institution. It is therein declared that upon the creation of the institution large contributions will be made. The charter is granted, and on its faith the property is conveyed.

2. Is this contract protected by the Constitution of the United States?

a. The provision in the Constitution is understood to embrace only such contracts as respect property or some object of value, and confer rights which may be asserted in a court of justice. The term "contract" must therefore be interpreted in the more limited sense, and must be confined to cases within the mischief it was intended to remedy. It does not comprehend the political relations between the government and its citizens, public officials, and laws generally, which are subject to constant mutation.

b. Is the act of incorporation a grant of political power, creating a civil institution employed in the administration of government? Are the funds of the college public property? Is the government of New Hampshire alone responsible for the institution?

(Or is the college a private eleemosynary institution, having the power to take property for private purposes, and to accept funds from donors who have themselves stipulated their future disposition and management?

It is a private and not a public institution:

1. As regards the source of its funds. Its foundation is purely private and eleemosynary, because its funds consisted entirely of private donations.
2. As regards the objects to which the funds are applied. Money may be given to education under private foundations, and trustees and professors employed in its administration are not public officers.
3. As regards the act of incorporation. Private corporations, artificial beings existing only in contemplation of law, are clothed with such properties as will best effect the object of their creation. The leading properties are immortality and individuality. This does not confer upon it political power or a political character. Its existence, powers, and capacities having been authorized by the state, it does not clothe the state with the power to change the form of property which it has authorized to be acquired, or to vary the purposes to which the property is applied.
4. As regards those for whose benefit the property donated was secured. The objects of the contributors and the incorporating act were the promotion of Christianity and education generally. The beneficial interest is not in the people of New Hampshire.
5. As regards the interests of original parties to the contract, and the potential right of beneficiaries. The original parties to the contract were the donors, the trustees, and the crown (to whose

rights and obligations New Hampshire succeeds). Their interests, together with those of past, present and future students, can only be protected by the board of trustees, which alone is empowered to act. This is a contract to which the parties have a vested beneficial interest and to which the protection of the Constitution of the United States is extended.

c. Has the obligation of the contract been impaired by the acts of the New Hampshire legislature complained of? Under these acts, the power of government of the college is transferred from the board of trustees to the state executive; the management and application of the funds of the institution, placed by the donors in trustees named in the charter, is given to the government of the state. It is reorganized and changed from a literary institution under the control of private literary men into a machine subject absolutely to the will of government. "It is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given."

IV. *Sturges v. Crowninshield* (4 Wheaton, 117).

This case involved the bankruptcy and contract clauses. The Constitution provides that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States." There was no federal bankruptcy law until 1800. Its authorship is ascribed to John Marshall. It did not work well, so it was repealed in 1803. Another act was passed in 1841 and repealed in 1843, and still another was passed in 1867 and repealed in 1878. The present law was passed in 1898. The English bankruptcy laws in force at the time of the adoption of

the Constitution applied to merchants and traders only. "Insolvency" laws governed proceedings under which debtors were authorized to surrender their property for the benefit of creditors, and thus secure a discharge. The Supreme Court has not observed this distinction.

State legislatures are forbidden to pass *ex post facto* laws which, according to Marshall, is a law "which renders an act punishable in a manner in which it was not punishable when it was committed." What was the intent of the Convention with respect to the *ex post facto* clause? Did it apply to civil as well as criminal laws? Dickinson called attention to the fact that according to Blackstone, *ex post facto* referred to criminal cases. The Convention took no action on this point. It appears, on the whole, that the intent of the Convention was to refer to both civil and criminal cases.

Facts. Certain notes were made prior to the enactment of the bankruptcy law. The notes fell due, and suit was instituted for their collection. A state bankruptcy law had been passed in New York, by which the debtor was discharged of his debt. It was claimed that the New York law operated to impair the contract.

Arguments. The following arguments were made for the state law:

1. The bankruptcy law affirms the contract.
2. Religion is part of the common law, and imposes the obligation to protect the poor.
3. The intention of the framers of the Constitution must be looked to. The contract clause was intended for those who evaded obligations.
4. The question was not a political, but a moral one.

The decision of the Court (John Marshall):

1. The states have power to pass bankruptcy laws in the absence of conflicting congressional legislation.
2. State laws which attempt to make transactions usurious and void which were not so when entered into are unconstitutional.
3. A state law which provides for discharging insolvent persons from debts contracted before the passage of the act is likewise unconstitutional.
4. The purpose of the members of the Constitutional Convention was to restore public confidence in private transactions by providing for their efficacy and enforcement.
5. The law of the state of New York operated to impair the contract, and was therefore void.

V. Ogden v. Saunders (12 Wheaton, 213).

In this case, Chief Justice Marshall gave his only dissenting opinion on a constitutional question. In thirty-four years' service on the bench he dissented only eight times. Of the 1,106 opinions delivered by the court during his service, the Chief Justice wrote 519.

Facts. Ogden, a citizen of New York, accepted there certain bills of exchange which in 1806 were drawn upon him in Kentucky, and which passed into the possession of Saunders, who was a citizen of Kentucky. Later, Ogden became a citizen of Louisiana, and was sued in assumpsit upon the bills in the United District Court for Louisiana. Ogden claimed a discharge in bankruptcy in New York, under a statute passed there in 1801. The case came before the Supreme Court on writ of error.

Arguments. Attorneys for the plaintiff were Webster and Wheaton. Wirt appeared for the defendant.

WHEATON: 1. This contract is a natural contract. Nature is not law.

2. The law is prospective in its application.

WEBSTER: 1. The law is not a part of the contract, for what would become of the contract if the law were repealed?

2. The contract clause is a great political measure designed to protect business transactions.

WIRT: 1. The contract must be dependent upon the state law.

2. Historical reasons concur to support this proposition.

3. Other laws have impaired the obligation of contracts, and have not been held unconstitutional.

Decision of the court. The judges in 1824 were Marshall, Washington, Livingston, and Story, who were Federalists; Todd and Duval, who were Jeffersonians; and Johnson. Thompson was appointed in 1823. There was apparently a deadlock in the case in 1824, and the court remained divided by accident until 1827, when the decision was made. Five opinions were given in the case.

Washington. 1. The municipal law of the state where the contract is made must govern the contract throughout, whenever its performance is sought to be enforced. It forms a part of the contract and of its obligation, and being a part of the obligation, cannot impair it.

2. The municipal law of the state, which controls the validity, construction, performance, remedy, evidence, and discharge of the contract, is paramount to the common law of all civilized nations, where the two conflict.

3. Laws passed regulating the validity, construction, and discharge of contracts, operating retrospectively, are generally held void, while those operating prospectively are sustained. One discharges the debtor and all his future acquisitions from the contract; while under the other the debtor surrenders everything he possesses towards the discharge of his obligation.

Thompson. If Congress can pass bankruptcy laws, why cannot the states do so?

Trimble. The law is a part of the contract.

Johnson. 1. The law is not a part of the contract, but the parties know their remedies under the law.

2. The law is constitutional.

Marshall. (Dissenting opinion for himself, and Justices Duval and Story.)

1. The law cannot be a part of the contract, because it gives to the legislature too much power.

2. If one law enters into all subsequent contracts, so does every other law which relates to the subject.

3. The legislature may change the remedy, but not the essence of the contract.

4. It is against public policy and against the intent of the framers of the Constitution to allow a discharge in bankruptcy under a state law when the creditor is the resident of another state.

It was the view of Marshall that the obligation of the contract was within the contract. The others held that the

obligation was in the law. Thus, Marshall believed, a contract was a mystical thing, outside the domain of law. The mystic phrase is "due process," the object of which is to enthrone private rights. This case was Marshall's one great defeat. The decision was revolutionary, and made inevitable the fourteenth amendment to the Constitution.

Johnson, in affirming for the majority the judgment of the lower court after the reorganization of the Supreme Court (Washington, Thompson and Trimble dissenting), declared that a discharge of bankruptcy by the laws of a state, as between citizens of the same state, is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts. He stated the following propositions:

1. That the power given to the United States to pass bankrupt laws is not exclusive.

2. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts.

3. When the states act upon the rights of citizens of other states, a conflict arises with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other states, and with the Constitution of the United States.

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CHAPTER XX

MARSHALL'S GREAT DECISIONS: INTERPRETATION OF THE GENERAL SCOPE OF FEDERAL POWERS

I. **McCulloch v. Maryland** (4 Wheaton, 316).

Facts. The Bank of the United States was incorporated by Congress in 1816. The next year a branch of this bank was established at Baltimore. In the year 1818, the Maryland legislature passed a law requiring all banks in the state not chartered by the state legislature to pay a stamp tax on their note issues. McCulloch, the cashier of the Baltimore branch, was held liable by the state courts for violating this statute. The case was taken to the Supreme Court of the United States on writ of error.

Decision of the court. There are two aspects to this case: that of interpreting federal powers; and, that of limiting the authority of the states.

1. Has Congress power to incorporate a bank?

a. "The government of the Union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, for their benefit."

b. The government of the United States is one of enumerated, and therefore limited, powers, but is supreme within its sphere of action, and must, within this sphere, bind its component parts.

c. The establishment of a bank or the creation of a corporation does not appear among the enumerated powers, but no phrase excludes incidental or implied powers, nor is an express and minute description of powers required. The extent of the powers of Congress is nowhere defined, and are virtually unlimited.

d. It is a constitution that is being expounded, and from the point of view of the general scope of federal powers granted by it, the instrument must be viewed as a whole.

e. Under the provision that Congress shall make "all laws necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof," Congress may provide for the execution of those great powers on which the welfare of a nation essentially depends, because: (1) the clause is placed among the powers of Congress, not among the limitations on those powers; and (2) its terms purport to enlarge, not to diminish, the powers vested in the government. The bank is therefore a needful function of government.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

2. Has Maryland the power to tax the local United States branch bank? While this act is not prohibited by any express provision, it was disclosed in the first part of the opinion, and may be regarded as axiomatic in this, that "the Constitution and the laws made in pursuance

thereof" are supreme; that they control the Constitutions and laws of the respective states, and cannot be controlled by them. From this general principle, the following corollaries are deduced:

a. That the power to create implies a power to preserve.

b. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve.

c. That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create.

d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

e. That this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution, and must be unconstitutional.

II. *Gibbons v. Ogden* (9 Wheaton, 1).

This is the first case involving the power of Congress over interstate commerce. It was agreed without serious discussion to vest in the national government the control of foreign and interstate commerce. This was due to trade discriminations and other abuses which under the Articles had rendered the commercial situation intolerable. The Committee of Detail suggested that Congress be empowered "to regulate commerce with foreign nations and among the several states." This was agreed to. The committee to which the matter of Indian affairs was referred, suggested

the addition of the words "and with Indian tribes." This was adopted, and in this form the clause was reported by the Committee of Style.

Facts. A statute passed by the New York legislature granted to Fulton and Livingston the exclusive right to navigate the waters of that state for a period of years. Fulton assigned to Ogden the right to navigate between New York City and places in New Jersey. Ogden secured an injunction in the state court against Gibbons, who was operating two steamboats between New York and New Jersey, enrolled and licensed in the coasting trade under the act of Congress of 1793.

Decision of the court.

1. The so-called principle of "strict construction" of the last of enumerated powers, authorizing Congress "to make all laws which shall be necessary and proper" for carrying its powers into execution, cannot be used to "cripple the government and render it unequal to the objects for which it is declared to be instituted, and to the powers given, as fairly understood, render it competent. . . ."

2. What is commerce? It is not only traffic, buying and selling, and the interchange of commodities. It is intercourse, and as such, includes navigation and its regulation as if the word navigation had been added to the word "commerce."

3. To what commerce does this power extend? "With foreign nations, and among the several states, and with the Indian tribes." It comprehends every species of commercial intercourse between the United States and foreign nations. The commerce with Indian tribes, at

the time of making the Constitution, was essentially within a state.

The completely internal commerce of a state is reserved for the state itself.

The term "among" means intermingled with, and is restricted to that commerce which concerns more states than one. "The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states."

4. What is this power? "It is the power to regulate; that is, to prescribe the rule by which Congress is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

5. Can a state regulate commerce with foreign nations and among the states while Congress is regulating it? While the states and the Congress may use the same means in the exercise of their acknowledged respective powers, but the same measures flow from distinct powers. A license to carry on the coasting trade means authority to do so, and a law inconsistent with that license granted by act of Congress is unconstitutional.

III. *American Insurance Company v. Canter* (1 Peters, 511).

This case involved the validity of the tribunal established at Key West, including the legal relation in which that territory and government stood to the United States, and the treaty and war-making powers. The specific question was whether or not admiralty jurisdiction in the territory of Florida might be exercised by courts whose judges were

appointed for terms of four years. The Constitution vests "the judicial power of the United States" in "one Supreme Court and such inferior courts as the Congress may from time to time establish. The judges both of the Supreme and inferior courts shall hold office during good behavior"

Decision of the court.

1. "The Constitution confers absolutely on the government of the Union the powers of making war, and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty."

2. The judicial clause of the Constitution does not apply to Florida.

3. The judges of the superior courts of Florida hold office for four years.

4. "These courts are not, then, constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited."

5. "They are legislative courts, created in virtue of the general right of sovereignty which exists in the government," or by virtue of the territorial clause of the Constitution.

6. "The right to govern may be the inevitable consequence of the right to acquire territory."

7. The jurisdiction with which these legislative courts are invested is not a part of the judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which the Congress possesses over the territories of the United States.

8. In legislating for the territories, the Congress exercises the combined powers of the general and of a state government.

9. The act of the territorial legislature creating the court in question was held not to be inconsistent with the laws and Constitution of the United States.

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CHAPTER XXI

THE POWER OF THE SUPREME COURT TO SET ASIDE ACTS OF CONGRESS

I. *Marbury v. Madison* (1 Cranch, 137).

Facts. William Marbury had been appointed justice of the peace in the District of Columbia. The appointment had been confirmed, and the commission was signed and sealed, but President Jefferson instructed that the papers should not be delivered. Marbury sought from the Supreme Court a writ of mandamus to Secretary Madison, who had refused to deliver the commission.

Decision of the court.

1. Has the applicant a right to the commission he demands? The court answered in the affirmative.

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? It was held that a remedy is afforded by the laws.

3. Is he entitled to the remedy for which he applies? This depends on the nature of the writ applied for, and the power of the court. The Judiciary Act of 1789 authorized the Supreme Court "to issue writs of mandamus . . . to any courts appointed or persons holding office under the authority of the United States." The power to issue such a writ is not within the original jurisdiction of the Supreme Court as defined under article III, section 2, paragraph 2 of the Constitution. An act of Congress conferring original jurisdiction in

cases not enumerated in the Constitution is repugnant to the instrument.

4. Can a jurisdiction conferred by Congress, not warranted by the Constitution, be exercised? May an act repugnant to the Constitution become the law of the land?

a. The people have an original right to establish their fundamental principles of government. Acts emanating from the people are supreme, and the rules established by them permanent.

b. "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."

c. Our government is one with limited powers. Legislative powers are defined and limited, and to make them more definite and effective, the Constitution is written.

d. If constitutional limits may at any time be passed by those intended to be restrained, then the doctrine of constitutional limitations is ridiculous. If an act of the legislature is on a level with the Constitution, "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

e. If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?

I. "It is emphatically the province and duty of the judicial department to say what the law is.

Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each."

2. If a law and the Constitution apply to a particular case, the court must decide between them. If, therefore, the courts are to regard the Constitution, and it is superior to ordinary legislative acts, the Constitution, and not the ordinary act, must govern the case to which both apply.
3. An examination of many sections of the Constitution indicates that the framers intended "that instrument as a rule for the government of courts, as well as of the legislature."
4. Judges take an oath, imposed by the legislature, to discharge their duties agreeably to the Constitution of the United States.
5. The Constitution is first mentioned in declaring what shall be the supreme law of the land. Moreover, only laws which shall be made in pursuance of the Constitution come within this category.
6. "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

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CHAPTER XXII

CONFLICTS OVER THE POWER OF THE JUDICIARY DURING THE FIRST QUARTER OF THE NINETEENTH CENTURY

I. *Chisholm v. Georgia* (2 Dallas, 419).

This was one of the earliest suits under the Constitution. Chisholm attempted to collect an old debt of the Revolution. The case involved the question whether or not a state could be sued by a private citizen. It was contended that the Supreme Court could not take jurisdiction in an action by a citizen against a state. The Georgia House of Representatives passed a resolution forbidding the execution of judgments of federal courts in the state of Georgia by federal officials.

The Supreme Court, however, assumed jurisdiction, and directed that papers be served on the governor and attorney-general of the state. Moreover, unless the state appeared to defend, it was ordered that judgment should be entered by default.

This decision of the court caused widespread protest, especially among those who opposed the growing power of the judiciary, and who championed state's rights. An act was passed by the House of Representatives of Georgia declaring that any official attempting to enforce the decision should be declared guilty of a felony and suffer death without benefit of clergy, by being hanged. The Massachusetts legislature regarded this power of the court as dangerous to the peace, safety, and independence of the several states and repugnant to the first principles of the

federal government. Two days after the decision was reached (February 20, 1793), the eleventh amendment to the Constitution was proposed by Senator Sedgwick, of Massachusetts. It was proposed by Congress in 1794, and ratified in 1798. It provides that

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

It was not intended by the framers of the Constitution that the federal judiciary should be authorized to entertain suits by individuals against states. In fact, such an intent was clearly denied. Hamilton, writing in the *Federalist*, and Madison and Marshall, in the Virginia convention of ratification, all expressed opinions to the contrary.

In a later case (*Hollingsworth v. Virginia*, 3 Dallas, 378), the Supreme Court unanimously declared, "that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state." This was understood as superseding all suits instituted previously to the adoption of the amendment as well as preventing the institution of new suits. In the case of *Hans v. Louisiana*, (134 U. S., 1), it was held that the state of Louisiana could not be sued by one of its citizens, even where the case involved a federal question other than the character of the parties, and even if the prohibition of the eleventh amendment did not in express terms apply to citizens of the state being sued.

Mr. Justice Iredell, in his dissenting opinion in the case of *Chisholm v. Georgia*, declared that it was not intended to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals, but only

by proper legislation to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

II. Repeal of the Judiciary Act and the Impeachment of Justice Chase.

The succession of Marshall to the Chief Justiceship and of Jefferson to the Presidency, was the beginning of a long and bitter contest between Republican and Federalist principles. Each group had its own constitutional doctrines, and attempted, through political action, to make its views prevail. The appointment of Marshall by John Adams, upon the resignation of Ellsworth, forestalled the appointment of Judge Spencer Sloane by Thomas Jefferson. Moreover, it placed the ablest and foremost Federalist of his day in an impregnable position, where, for more than a third of a century he moulded the constitutional doctrines and practices of the country, withstood the attacks of the states against the federal system, of the legislature and the executive against the courts and championed the principles of judicial supremacy and independence against a determined opposition.

In 1801, a law was passed creating sixteen new circuit judgeships, and reorganizing the judicial system with the sole purpose of filling the courts with judges having Federalist sympathies. Adams immediately proceeded to appoint Federalists to these positions at the close of his term. In a letter to Mrs. John Adams, Jefferson complained of Adams' appointments as unkind, as the appointees were his ardent political enemies, and he was forced, either to deal through men who would deliberately defeat his views, or incur the odium of displacing them. "It seemed but common justice," he declared, "to leave a successor free to

act by instruments of his own choice." The matter was referred to in Jefferson's first annual message to Congress. The law was repealed in 1802.

Justice Chase was angered by the opposition to Federalist principles. He was especially aroused over the repeal of the judiciary act, the extension of suffrage in Maryland, and the victory of Jefferson. So much was he nettled, that in a charge to a grand jury, he made the following statement:

You know, gentlemen, that our state and national institutions were framed to secure to every member of the society equal liberty and equal rights; but the late alterations of the federal judiciary by the abolition of the office of sixteen circuit judges, and the recent change in our State constitution, by the establishment of universal suffrage, and the further alteration that is contemplated in our State judiciary (if adopted) will, in my judgment, take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed if the bill for the abolition of the two supreme courts should be ratified by the next general assembly. The change of the State Constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty, and our republican constitution will sink into a mobocracy, the worst of all possible governments.

Jefferson was of the opinion that Justice Chase should be punished for this indiscretion. The House of Representatives impeached him, but the trial was conducted mainly along party lines, and disclosed no criminal actions on the part of the judge. The impeachment strengthened rather than weakened the judiciary, and discouraged use of the power of impeachment as a weapon to control the courts.

III. *United States v. Peters* (5 Cranch, 115).

One Gideon Olmsted and others from the state of Connecticut were captured by the British and put to work on

the British boat "Active" as prisoners of war. The prisoners seized the boat and sailed for Egg Harbor, where the boat was captured by a Pennsylvania warship. In 1778, the Admiralty court of Pennsylvania condemned it as prize and awarded it to the Pennsylvania captors. Olmsted and associates carried the case on appeal to the Court of Appeals instituted by Congress, which court awarded the boat to the original captors (Olmsted and party). The marshal of the court was directed to sell the boat and turn the proceeds over to Olmsted, but he paid the money to Judge Ross of the Pennsylvania Admiralty Court, who in turn gave it to the state treasurer of Pennsylvania. After the treasurer's death, Olmsted and party brought suit against the executors in the United States District Court, and obtained judgment. Judge Peters of the District Court refused to allow Olmsted an attachment. In 1809 a writ of mandamus was sought from the Supreme Court directing Judge Peters to issue the attachment in obedience to the sentence of the District Court. Judge Peters set up as a reason for not taking action, a state statute passed subsequent to the admiralty proceedings, directing the governor to demand the funds sought in the proceedings, and to use any means necessary to protect such funds from process issuing out of the federal court. The Supreme Court held that the federal court had jurisdiction in the original proceeding; that the Supreme Court had jurisdiction to entertain the mandamus proceeding; and that the "act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question." The Court decided that the funds should be turned over to Olmsted and associates.

The state refused to pay the money, and the governor called out the militia to resist the execution of the attach-

ment. Moreover, the legislature resolved that there was no impartial tribunal to pass on conflicts between the state and the nation, and proposed an amendment to remedy this alleged defect. Virginia replied to the proposal, taking a position contrary to the Virginia resolutions of 1798. Eventually the state militia officers were arrested and fined and the order enforced. The state was beaten.

IV. *Cohens v. Virginia* (6 Wheaton, 264).

This is the great Lottery case. Virginia had passed a law forbidding lotteries. The City of Washington had organized a lottery. Cohens sold lottery tickets in the state of Virginia. The result was a conflict of these laws.

Questions, and the decision of the court.

1. Can the corporation of Washington or the federal government pass a law overriding a state law? The act of Congress was not intended to give the corporation of Washington the authority of controlling the laws of states within the states themselves, as claimed by the lottery law. However, Congress might authorize a corporation of the Federal District to exercise legislation within a state, taking precedence of the laws of the state.

2. Does an appeal lie from the state courts to the United States courts? This was decided in the affirmative.

3. When the state is a party, is there appellate jurisdiction on the part of the federal courts? It was held by Marshall and the court that when a state brings suit in a state court against an individual and gets judgment, an appeal in such action may be taken by the defendant to the Supreme Court on constitutional points. Thus, in spite of the eleventh amendment, a state can be brought as a defendant to the bar of the Supreme Court.

Judge Roane of Virginia declared that the federal judiciary "claims the right not only to control the operations of the coordinate departments of the government, but also to settle exclusively the chartered rights of the states." Jefferson regarded the opinion in the main as extra-judicial, and criticised Marshall for his practice of stating what the law would be in a moot case not before the court. In regard to Roane's activities against him, Marshall declared: "There is on the subject no such thing as a free press in Virginia and of consequence the calumnies and misrepresentations of this gentleman will remain uncontradicted and will by many be believed to be true. He will be supposed to be the champion of state rights, instead of being what he really is—the champion of dismemberment." He expressed surprise that Madison had embraced the views of Jefferson as to the judiciary, and remarked: "In Virginia, the tendency of things verges rapidly to the destruction of the government and the reestablishment of a league of states."

V. *Osborne v. President, etc., of the Bank of the United States* (9 Wheaton 738).

The state of Ohio levied a tax on each branch bank of \$50,000. Officers of the bank refused to pay the tax, and the state officials collected it by force. The Bank of the United States, chartered by Congress, brought suit in the federal circuit court for Ohio, as authorized by its charter, to recover the funds collected, and to restrain Osborne and others, officers of the state of Ohio, from collecting the tax. The state officials appealed to the Supreme Court from a decree against them.

The Ohio legislature passed resolutions covering the following points:

1. Denial of the exclusive jurisdiction of the Supreme Court to pass upon constitutional questions.
2. Citing the eleventh amendment.
3. Endorsing the doctrines of the Virginia and Kentucky resolutions, and pointing to the election of 1800 as a vindication.
4. Declared that Ohio did not have to acquiesce in the decision of the case of *McCulloch v. Maryland*.
5. Threatened the withdrawal of protection to the bank.

Decision of Marshall and of the Court.

1. The Constitution declares that the judicial power shall extend to all cases in law and equity arising under the Constitution, laws, and treaties of the United States.
2. The judicial department is therefore authorized to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States when the subject becomes a case (i.e., when the subject is submitted to it by a party who asserts his rights in the form prescribed by law).
3. The Supreme Court has original jurisdiction over cases affecting ambassadors, other public ministers, and consuls and cases in which a state may be a party, and cannot be exercised in its appellate form. In all other cases, the power may be exercised in its original or appellate form, or both, as Congress may determine.
4. Excepting the cases of original jurisdiction conferred upon the Supreme Court, no cases exist to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the

Constitution. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power.

5. Congress can give the circuit courts original jurisdiction in any case to which the appellate jurisdiction of the Supreme Court extends.

6. The fact that several questions arise depending upon the general principles of law rather than a law of the United States, does not oust jurisdiction or establish that the case does not arise under the law of the United States.

7. The clause giving the bank the right to sue in the circuit courts of the United States arises under the law of Congress regulating judicial power, and is constitutional.

Jackson attacked the bank in a special message to the Congress. In spite of this, Congress passed a bill providing that the corporation be rechartered. In his veto message he declared that he could not assent to the conclusion that the constitutionality of the bank should be considered as settled by the decision of the court. He wrote:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this government. The Congress, the executive, and the court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, or the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and, on that point, the President is independent of both. The authority

of the Supreme Court must not, therefore, be permitted to control the Congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

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CHAPTER XXIII

THE SUPREME COURT AND STATE'S RIGHTS, UNDER CHIEF JUSTICE ROGER B. TANEY

I. The advent of Taney as Chief Justice.

Roger B. Taney was born in Maryland in 1777, of Virginia planter ancestry. He was of the Catholic faith. He was educated at Dickinson College. At first he was a Federalist, but turned to the Jeffersonian party and principles after the war of 1812. He was Attorney-General under Jackson in 1831, and in time became Jackson's chief adviser. As Secretary of the Treasury he advised the removal of bank deposits. The Senate having refused to confirm his nomination, he resigned. He was first appointed as associate justice of the Supreme Court in 1834, but the Senate refused its confirmation. Upon Marshall's death, he was appointed Chief Justice of the United States. He was, in general, a believer in the principles of the democratic party, and it was the intent of the appointing authority to neutralize the influence of Marshall by placing at the head of the court a state's right man who belonged to the school which Marshall called "strict" or "narrow constructionists." For nearly thirty years, Taney's influence as Chief Justice was felt.

The court under Taney was constituted as follows: Trimble, Kentucky (1826); McLean, Ohio (1829); Baldwin, Virginia (1830); Wayne, Georgia (1835); Taney, Maryland (1836); Barbour, Virginia (1836); Catron Tennessee (1837); McKinley, Alabama (1837); Daniel, Virginia (1841).

Thus the court was reconstituted with men of Southern and democratic sentiments much as it was reorganized at the end of John Adams' administration with men of Federalist principles.

II. *Briscoe v. Bank of Kentucky* (11 Peters, 257).

Craig v. Missouri (4 Peters, 410) is the background for this case. These cases illustrate the struggle of the west for control through the extension of credit. In order to supply itself with credit, the Missouri legislature authorized the issuance of paper money. This case involves the validity of this act. Craig borrowed money from the state under the act, and refused to pay.

Benton, counsel for Missouri, maintained that the certificates issued by the state were not money, but the same as "wolf-scalp" money. Marshall was not satisfied with this argument. He asked: "What is a bill of credit?" In his opinion, it was paper intended to circulate on the faith of the state, redeemable at a future date. This, he said, was forbidden by the Constitution, and the law was declared null and void. Three justices dissented, arguing that the state merely promised to receive the certificates in payment.

The state of Kentucky decided to resort to the expedient of organizing the Bank of Kentucky. The stock was subscribed by the state, consisting of money paid for state lands. A President and twelve directors were to be chosen by the legislature. The bank was authorized to issue notes payable to bearer, i.e., the bank and not the state. The case of *Briscoe v. the Bank of Kentucky* came before Marshall in 1834. There were only four justices on the bench, and Marshall was unable to effect an agreement. In postponing this case and that of *City of New York v. Wilson* (11 Peters, 102), he remarked:

The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in the opinion, thus making the decision a majority of the whole court. In the present case four judges do not concur in the opinion as to the constitutional question which has been argued. The court, therefore, directs these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present.

In the meantime, Taney had become Chief Justice. The opinion in *Briscoe v. the Bank of Kentucky* was given by Justice McLean, who held that the bills were not issued by the state but by the bank, and that the prohibition in the Constitution against the issue of bills of credit by a state does not forbid the issue of circulating notes by a state chartered corporation, even though the state owns all the stock therein. Justice Story strongly dissented.

The effect of this decision was immediate. States began to charter banks to issue money. It was practically a return to the monetary system under the Articles, and amounted to a complete undoing of the Constitutional monetary system.

III. *Charles River v. Warren Bridge* (11 Peters, 420).

In 1650 the legislature of Massachusetts granted certain ferry rights to Harvard College. In 1785 the legislature authorized "The Proprietors of the Charles River Bridge" to erect a bridge between Charleston and Boston in place of what was then a ferry, and to take tolls for its use. The charter was to run for forty years and for this period the company was to pay £200 annually to Harvard College, owner of the ferry. In 1786 the bridge was opened, and in 1792 the charter was extended to seventy years. In 1828 the Warren Bridge Company was authorized to construct a bridge a short distance from the Charles River Bridge. The Warren bridge was to be free in six years or sooner if

tolls paid its cost before then. The old bridge company was in effect destroyed, and sought an injunction from the state courts restraining its construction and use. The state supreme court failing to decide the case, a writ of error was taken to the Supreme Court. In the meantime the Warren bridge had become toll-free.

The main question in the case was this: Can a state grant a charter destroying the effect and value of a previous one? Does it not constitute an impairment of the obligation of a contract?

The decision, given by Taney, embraced the following points:

1. There was no evidence that the state had given an exclusive franchise, and such an interpretation required stretching the words of the charter so as to arrive at such a construction.

2. The English courts restrain within strict limits the spirit of monopoly. There is no reason why we, having adopted the jurisprudence of England, should construe a statute in favor of monopoly, and against the public and the rights of the community.

3. It would be inconvenient and inexpedient to construe old franchises and contracts as preventing new ones, even conflicting with, the old, which introduce improvements and take advantage of modern science. Should the railways yield to the old turnpike corporations?

4. The limitations of state control of private corporations would threaten and render useless the continued existence of the government, when the powers necessary to accomplish its ends and the functions it was de-

signed to perform were transferred to the hands of privileged corporations.

5. The charter must be strictly construed, and nothing can be claimed which is not clearly given. Ambiguity must be resolved in favor of the public, and against the corporation.

6. The rights of the community must be safely guarded, as are the rights of private property. In the course of the opinion, the Chief Justice made the following significant statement :

But the object and end of all government is to promote the happiness and prosperity of the community by which it is established ; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. . . . While the rights of private property are safely guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends upon their faithful preservation.

Taney, in this decision, began his construction of the Constitution freely for the state, and narrowly for the individual. While Marshall regarded the end of government and the purpose of the Constitution as protecting individual and private rights, Taney regarded the happiness and prosperity of the people and of the community as paramount. Moreover, Taney used the doctrine of political expediency in favor of the state governments as against individuals and corporations, much as Marshall used the same doctrine in favor of the federal governments as against the state governments, and in protecting private rights.

Story gave a strong dissenting opinion. Kent, writing to Story, said : "The legislature is bound by everything that is necessarily implied in the contract." He (Story) feared

that no law of a state legislature or law of Congress would be declared unconstitutional, "for the old constitutional doctrines are fast fading away, and a change has come over our public mind from which I augur little good." He soon resigned, giving as his reason:

I have long been convinced that the doctrines and opinions of the "old court" were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the old Constitution, so vital to the country, which in former times received the support of the whole court, no longer maintain their ascendancy. I am the last member now living of the old court, and I cannot consent to remain where I can no longer hope to see these doctrines recognized and enforced.

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CHAPTER XXIV

NULLIFICATION IN NEW ENGLAND AND SOUTH CAROLINA; SECESSION IN THE SOUTH

I. The Hartford Convention.

A. Reasons for the Convention. The Federalist party and New England opposed the War of 1812. It was asserted that its shipping interests had suffered during the war, and that embargoes had crippled it further; that the war had been declared and supported by people outside of and against the interests of New England; that the admission of new states in the west and south would soon give these regions complete control of the government; and that the government of the United States gave no thought to the interests of New England.

Gouverneur Morris, a member of the Constitutional convention, advocated that a new convention be held to determine whether the states of the North should remain in the Union. The Connecticut general assembly described the status of that state to the central government as "free, sovereign, and independent." The Massachusetts senate passed a resolution declaring that the war was without justifiable cause, and withheld its approval from military and naval plans unconnected with the defense of its seacoast and soil.

B. The Convention and the delegates. The Convention met at Hartford in October, 1814, at the call of

Massachusetts. The delegates from Massachusetts, Connecticut, and Rhode Island were authorized by the state authorities. The delegates from New Hampshire and Vermont represented certain counties of these states. The sessions were secret. The avowed purpose of the Convention was to consider the dangers to the eastern section growing out of the war, and to determine upon some plan to prevent the ruin of the commercial interests and resources of New England.

C. The resolutions of the Convention. These general principles were agreed to: Congressional acts violating the Constitution are void; in case of emergencies, the states must be their own judges, and execute their own decisions; and in case of dangerous and deliberate infractions, the state must intervene, and on its own authority, protect its citizens. Its specific proposals embraced a request to allow the New England states to devise a scheme of defense for themselves, to be paid for from taxes paid by these states, and the following suggested amendments to the Constitution: that new states should not be admitted to the Union without the consent of two-thirds of both houses of Congress; that slaves should not be reckoned in the apportionment of taxes and representatives; that war should not be declared or commercial intercourse broken off with other nations without the consent of two-thirds of both houses of Congress; that no embargo should exist for more than sixty days; that foreign-born citizens should not hold office; and, that the President should be declared ineligible to reelection.

D. Effect of the Convention. The resolutions of the Convention called for another session. The war came to an end before anything came of their suggestions. To defend their course, the New Englanders fell back upon the doctrine of nullification, which they condemned when suggested by the South. The leaders, bordering on treason, were consigned to the political wilderness.

II. Nullification in South Carolina.

A. Reasons for the nullification movement. This was due largely to the growth of protection as a national policy. The tariff of 1816 was designed to protect the infant industries and to create a demand for American agricultural produce. The western farmers and northern manufacturers thrived under this system. The southern cotton growers, shipping their cotton to England, wanted to purchase in the cheapest market, England. The "Tariff of Abominations" was passed in 1828. Clearly, the South was less prosperous than in the days of a low tariff. South Carolina, almost exclusively an agricultural state, suffered much financial loss from it.

B. Measures of nullification. The South Carolina concept of the Union included these principles: the Union is merely a compact of equal states; the federal government is only an agent of the states to carry into effect what it is commissioned to do; instructions to the federal government are contained in the Constitution; a violation of instructions by the federal government renders its action null and void; and the states are to be the judges of when the Constitution has been violated.

In the *Fort Hill Letter* of August 28, 1832, it was declared that the state in its capacity as a sovereign state could lawfully nullify federal usurpations of power; that the federal government had no authority to close the Charleston port of entry; protested against the tariff bill of 1832; and, as a general principle, sought to prove and establish the Union as federative, rather than national, in character.

The Ordinance of Nullification was passed by a Convention which met November 24, 1832, at the call of the state legislature issued on October 16, 1832. The vote was 136 to 26. The tariff was described as a violation of the Constitution, and therefore null and void. The acts of 1828 and 1832 were held not to be binding on South Carolina. State officials were compelled to take an oath to uphold the ordinance of nullification. The ordinance was to go into effect February 1, 1833. It contained the following significant statement:

The people of this state will thenceforth hold themselves absolved from all further obligations to maintain or preserve their political connection with the people of other states and will forthwith proceed to organize a separate government and do all other acts and things which sovereign and independent states may of right do.

The Replevin Act was passed by the state legislature. The owner of seized goods might recover twice their value from the arresting and holding officer. Moreover, the governor was authorized to call out the state militia to enforce the laws of the state.

C. *The Nullification Proclamation and the course of Jackson.* At a Jefferson dinner in 1830, Jackson

proposed this toast: "Our federal union; it must be preserved." Upon hearing of the course of events in South Carolina, he declared: "If a single drop of blood shall be shed there in opposition to the laws of the United States, I will hang the first man I can lay my hands on engaged in such conduct, upon the first tree that I can reach." He prepared to use the army and navy to sustain the authority of the federal government. During the course of the Proclamation, he declared:

The laws of the United States must be executed; I have no discretionary power in the subject. My duty is emphatically pronounced in the Constitution. Those that have told you that you might peaceably prevent their execution deceived you. Their object is disunion, and disunion, by armed force, is treason. Are you ready to incur its guilt? If you are, on your unhappy state will fall all the evils of the conflict you force upon the government of your country.

The order by Jackson of troops into Fort Moultrie in the harbor of Charleston, and the enactment of the "Force Bill," brought things to a head.

D. *The Clay Tariff of 1833.* Jackson, in his message to Congress, asked for the limitation of protection to articles made in America needed in war time. Clay suggested a bill gradually reducing the tariff rates until they were equivalent to the rates of the measure of 1816 by the year 1842. This bill was passed.

South Carolina, regarding the action of Congress as a vindication of her position, repealed the Nullification Ordinance, but passed a measure nullifying the Force Bill.

E. *The Hayne-Webster Debate.* In support of nullification, Senator Hayne of South Carolina, in January, 1830, in a notable speech in the Senate Chamber, urged the South Carolina concept of the union, set forth the proposition that the Union was a compact of sovereign states from which the parties could lawfully withdraw, and that the federal government could not be the judge of its own powers. Daniel Webster, Senator from Massachusetts, defended the national character of the union in a celebrated reply. He set forth the following propositions: the Constitution is not a league between several states, but is founded upon the adoption of the people; no state can dissolve federal relations, for this can be done only by revolution, and secession is revolution; the supreme law of the land is indicated by the Constitution, and in the character of the suit, the Supreme Court is the final arbiter; an attempt to nullify is a violation of the Constitution of the United States.

III. Secession in the South.

The spirit of *nullification*, which is the retention of membership in the federal union, but refusing to be bound by certain of its laws, continued until it developed into a spirit of *secession*, which means withdrawal from the union as a sovereign in the just exercise of its rights through the repeal of the act of ratification. The annexation of Texas, together with the plan to create eight new states of this territory, incurred the opposition of the North. The legislature of Massachusetts passed a resolution declaring that Texas was a foreign nation, and under the Constitution, Congress had no authority to admit a foreign state. If it

took place, Massachusetts would leave the Union. William Lloyd Garrison suggested that the northern states secede in case Texas was brought into the Union a slave state.

The main causes of secession were the activities of the abolitionists, the raid of John Brown, the question of disposing of the territories, and the divergent views of the North and South over the character of the union and the institution of slavery. Certain economic, diplomatic, social and political reasons caused the north to desire union and the south to work for disunion. We are interested here only in the Constitutional aspects and issues of the conflict. The course of the war and the extra-constitutional aspects are for the historian.

In the end, the Union was preserved, Calhoun's theory of state sovereignty had to yield to that of national sovereignty, slavery was abolished, and the principles written into the Constitution by Hamilton and interpreted by Marshall, but overthrown by Jefferson and Jackson, were re-established by Lincoln after success on the field of battle.

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CHAPTER XXV

SLAVERY UNDER THE CONSTITUTION; THE SLAVE CASES

I. The constitutional aspects of slavery.

- A. *The apportionment clause*, providing that two-thirds of the slave population should be counted in the apportionment of representatives and direct taxes.
- B. *The migration or importation clause*, allowing the importation by the states of such persons as they choose to admit prior to the year 1808.
- C. *Fugitive slave and labor clause*: "No person, held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

In 1793, Congress passed an act providing summary proceedings for the removal of escaped persons bound to service. In 1850, as a part of the Great Compromise, there was enacted a drastic fugitive slave law. By its terms, its enforcement was placed in the hands of federal officials, thus removing state control over the matter. The masters or their agents, upon application in due form, could remove in a summary fashion their runaway slaves, without affording them the right of trial

by jury, the right to witness, or the right to offer any testimony in evidence. Persons hindering its enforcement were to be heavily penalized.

- D. *The territorial clause*: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." "New states may be admitted by the Congress into this Union." Upon these clauses the greatest discussions hinged.

Article six of the Northwest Ordinance of 1787 excluded slavery and involuntary servitude from the Northwest Territory. Thus, early in our history the power of Congress over the territories of the United States was recognized. In 1812, Louisiana was admitted to the Union over the strong protest of the Federalists, but with limitations on the admitted state. Under the Missouri Compromise of 1820, after a deadlock in the Senate, Maine was admitted as a free state and Missouri as a slave state. The residue of the Louisiana territory north of the parallel 36 deg. 30 min. was to be forever free, while to the south, slavery was to prevail. Senator King, in his speeches, disclosed an exhaustive study of these two clauses of the Constitution, and of the right of Congress to exclude slavery. The result was a compromise. The "Wilmot Proviso," failing of adoption, resolved that slavery should be prohibited forever from every part of any territory acquired from Mexico.

Under the Great Compromise of 1850, the territories of New Mexico and Utah were created, to

be admitted as slave or free, according to their own constitutions. California was admitted as a free state under a constitution which excluded slavery. Slavery was abolished in the District of Columbia. In addition to this, a fugitive slave law was passed.

Under the Kansas-Nebraska bill of 1854, these territories were admitted "with or without slavery as their constitutions may prescribe at the time of their admission," and the Missouri Compromise was repealed as conflicting with the policy of non-intervention followed by Congress in regard to slavery in the territories. Therefore, the question of the power of Congress to prohibit slavery in the territories was reopened.

II. *Dred Scott v. Sanford* (19 Howard, 393).

Facts. In 1834, one Dred Scott, a negro slave belonging to Dr. Emerson, was moved from Missouri, a slave state, to Illinois, a free state. In 1836, Dr. Emerson removed from Illinois to the Minnesota Territory, which, under the Northwest Ordinance, was free territory. Dred Scott went with him and was allowed to marry. In 1838, Dred was taken back to Missouri. In 1846, he brought suit against the widow of his former master in the Missouri Circuit Court, claiming that he had been taken to Illinois, and thence to the Louisiana territory, which was free territory under the Northwest Ordinance and under the Missouri Compromise. He asserted that he had become free, and that he continued to be impressed with this status after his return with his master to the state of Missouri. In 1850, the state Circuit Court found him to be free. The Supreme Court of Missouri, on appeal, held in 1852 that under the

laws of Missouri he resumed his character of slave upon his return, without regard to his status outside the state. Suit was instituted in Scott's behalf by certain lawyers in the United States Circuit Court. To give jurisdiction to the court on the ground of diverse citizenship, Mrs. Emerson arranged for a fictitious sale of Scott to Sanford, her brother. Mrs. Emerson had in the meantime married an abolitionist representative from Massachusetts. This court found against Scott on May 15, 1854, and the case was taken to the Supreme Court on writ of error. Before the case was tried, the Missouri Compromise Act was repealed.

There are two ways the Supreme Court could have proceeded. It could have taken jurisdiction and applied the law of Missouri, thus avoiding the Missouri Compromise; or it might have dismissed the case for want of jurisdiction, Dred Scott not being a citizen.

The case was opened for the first time in 1856. On April 8, 1856, Judge Curtis wrote an uncle in confidence that the Court would not decide so as to involve the Missouri Compromise, as a majority of the court regarded it as unnecessary. The case was reargued in December, and Judge Nelson was designated to write the opinion, avoiding the Missouri Compromise. Early in 1857, a strange turn of events resulted in the designation of Taney to write the decision, so as to settle the question of the power of Congress over slavery in the territories.

Opinion of the Court, as delivered by Chief Justice Taney.

1. Did the federal circuit court of Missouri have jurisdiction over the case? Was Scott a free citizen?

a. The people of the United States, under the Constitution, are the sovereign people, and the makers of the Constitution did not intend that negroes should be

one of these sovereign people, nor that a state could make a negro a citizen of the United States.

b. Negroes were not citizens at the time of the adoption of the Constitution, and under its terms they were regarded as inferiors, for more could be imported as slaves, and fugitive slaves were to be returned.

c. The laws of Congress show that negroes are not citizens. The naturalization statutes mention whites, while the militia laws refer to white, and make distinctions between whites and blacks. The department of state has refused to extend protection to negroes on the ground that they are not citizens of the United States under the Constitution.

2. Did Scott's residence in Minnesota free him? Did Congress have the authority to pass the Missouri Compromise?

a. The Constitution, in giving Congress the right to make all needful regulations for territories and property of the United States, referred only to the territory as it existed in 1789.

b. The Louisiana territory was held in trust by the government for the benefit of the entire Union.

c. Under the Fifth Amendment, Congress cannot deprive one of life, liberty, or property, without due process of law. A law taking from a white man that for which money has been paid, is a violation of this amendment.

d. The Missouri Compromise is unconstitutional because it deprives of property without due process of law. Moreover, Congress did not have the power to pass it, and Dred Scott is not a citizen of the United States.

Dissenting opinion of Judge Curtis.

1. Who were citizens at the time of the adoption of the Constitution? It was held that those who were citizens under the Articles were citizens, for the Constitution did not change citizenship. Then, certain persons descendant from slaves were citizens. In the year 1781, five states had negro citizens. Free-born citizens of the states are citizens of the United States, and as such have the right to sue and to be sued in the federal courts. The act of civil marriage of Scott, agreed to by his owner in free territory, was practically an act of emancipation.

2. Is the Missouri Compromise constitutional? Yes, for Congress has the power to make all needful regulations, including the regulation of slavery in the territories.

3. Is Dred Scott a citizen? Yes, for the reasons given.

Change in the plans of the Court. It appeared after Judge Nelson had been assigned to write the opinion, avoiding the Missouri Compromise, that the dissenting judges, McLean and Curtis, intended to write opinions sustaining the constitutionality of the act. Judge Wayne, believing that the question of slavery in the territories should be set at rest by the Court holding that Congress was powerless to prohibit it, both from the standpoint of expediency, and from the constitutional standpoint, persuaded Taney, Campbell, Daniel and Catron that the assignment to write the opinion should be given to the Chief Justice, and that the constitutional question should be covered. Judge Grier was opposed to expressing an opinion on the constitutional question. Catron, in the following letter, asked the

cooperation of President-elect Buchanan in winning Grier to his point of view :

The Dred Scott case has been before the Judges several times since last Saturday, and I think you may safely say in your Inaugural: "That the question involving the constitutionality of the Missouri Compromise line is presented to the appropriate tribunal to decide, to-wit: the Supreme Court of the United States. It is due to its high and independent character to suppose that it will decide and settle a controversy which has so long and seriously agitated the country, and which *must* ultimately be decided by the Supreme Court. And until the case now before it (on two arguments) presenting the direct question, is disposed of, I would deem it improper to express any opinion on the subject." A majority of my brethren will be forced up to this point by two dissentients. Will you drop Grier a line, saying how necessary it is, and how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other? He ought not to occupy as the outside issue—that admitting the constitutionality of the Missouri Compromise Law of 1820, still, as no domicile was acquired by the negro at Fort Snelling, and he returned to Missouri, he was not free. He has no doubt about the question on the main contest, but has been persuaded to take the smooth handle for the sake of repose.

Buchanan, having evidently written to Grier, received the following letter from him on February 23:

Your letter came to hand this morning. I have taken the liberty to show it, in confidence, to our mutual friends, Judge Wayne and the Chief Justice.

We fully appreciate and concur in your views as to the desirableness at this time of having an expression of the opinion of the court on this troublesome question. With their concurrence, I will give you in confidence the history of the case before us, with the probable result. Owing to the sickness and absence of a member of the Court, the case was not taken up in conference till lately. The first question that presented itself was the right of a negro to sue in the Courts of the United States. A majority of the Court were of the opinion that the question did not arise on the pleadings and that we were compelled to give an opinion on the merits. After much discussion it was finally agreed that the merits of the case might be satisfactorily decided without giving an opinion on the question of the Missouri Compromise; and the case was committed to Judge Nelson to

write the opinion of the Court affirming the judgment of the Court below, but leaving these difficult questions untouched. But it appeared that our brothers who dissented from the majority, especially Justice McLean, were determined to come out with a long and labored dissent, including their opinions and arguments on both the troublesome points, although not necessary to a decision of the case. In our opinion, both the points are *in* the case and may be legitimately considered. Those who hold a different opinion from Messrs. McLean and Curtis on the power of Congress and the validity of the Compromise Act feel compelled to express their opinions on the subject, Nelson and myself refusing to commit ourselves. A majority, including all the judges south of Mason and Dixon's line, agreeing in the result, but not in their reasons—as the question will be thus forced upon us, I am anxious that it should not appear that the line of latitude should mark the line of division in the Court. I feel, also, that the opinion of the majority will fail of much of its effect if founded on clashing and inconsistent arguments. On conversation with the Chief Justice, I have agreed to concur with him. Brother Wayne and myself will also use our endeavors to get Brothers Daniel and Campbell and Catron to do the same. So that if the question must be met, there will be an opinion of the Court upon it, if possible, without the contradictory views which would weaken its force. But I fear some rather extreme views may be thrown out by some of our southern brethren. There will, therefore, be six, if not seven (perhaps Nelson will remain neutral), who will decide the Compromise law of 1820 to be of *non-effect*. But the opinions will not be delivered before Friday, the 6th of March. We will not let any others of our brethren know anything about *the cause of our anxiety* to produce this result, and though contrary to our usual practice, we have thought it due you to state to you in candor and confidence the real state of the matter.

On the fourth of March, 1857, Buchanan, in his Inaugural Address, referred to the simple rule adopted by Congress in regard to slavery in the territories, namely, that the majority shall govern. As to the constitutionality of the Missouri Compromise, the question was before the Supreme Court, which would speedily and finally settle the question. "To their decision," he declared, "in common with all good citizens, I shall cheerfully submit, whatever this may be, though it has ever been my individual opinion

that, under the Kansas-Nebraska Act, the appropriate period will be when the number of actual residents in the territory shall justify the formation of a Constitution with a view to its admission as a state into the union."

Charges of collusion between the President-elect and the majority of the Court to declare the Missouri Compromise unconstitutional, were made. The letters of Catron and Grier prove communication to the executive of what was generally regarded as confidential information, but the practice was common where confidence was enjoined. Indeed, the majority of the court, instead of wanting to decide the constitutional question, desired to remain non-committal on this point until the dissenting justices forced them to state their views.

Lincoln, in his campaign speeches, attacked the Dred Scott decision. In his inaugural address, he made the following comment on the Supreme Court:

I do not forget the position, assumed by some, that constitutional questions are to be decided by a Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decisions may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

III. *Ableman v. Booth* (21 Howard, 506).

Facts. Three negroes were playing "seven-up" near Racine, Wisconsin. One of them was seized by a United States marshal, taken to Milwaukee, and put in jail. Sherman H. Booth, editor of the *Wisconsin Free Democrat*, a free soil paper, printed a handbill calling upon the citizens and asking whether they would permit a man to be carried out of the state without judicial proceedings. He called a meeting and decided to ask the county judge to issue a writ of habeas corpus, with a view to securing the negro's dismissal and sending him to Canada. On the advice of the federal judge, the sheriff refused to deliver up the prisoner. Thereupon the assembly of people went to the county jail, broke into it, took the negro and carried him into Canada. An extra-legal convention met on April 13, 1854, and passed resolutions resembling the Kentucky resolutions. The owner of the negro had Booth arrested for aiding and abetting the escape of a slave, and he was brought to trial before the United States District Court. Booth applied to the state Supreme Court for a writ of habeas corpus before the federal court met for trial. The state Supreme Court held the fugitive slave law to be unconstitutional and Booth was liberated. He was rearrested, convicted by the federal District Court, and sentenced to pay a fine of \$1,000 and to one month's imprisonment. The fugitive slave law was held to be constitutional. Again, meetings were held and resolutions bordering on nullification were passed. Booth again had recourse to the Supreme Court of the state, which again released him on a writ of habeas corpus, and still held the law to be unconstitutional.

Ableman, the United States Marshall, brought an action against Booth. Upon application to the Supreme Court, a

writ of error was issued commanding the Wisconsin Supreme Court to make a return of its judgment and proceedings for review by the United States Supreme Court. The state Supreme Court paid no attention to the writ, but a decision was made.

Points in Taney's decision:

1. The prisoner was held under the authority of the United States.
 2. All the actions of the state courts were invalid.
 3. The fugitive slave law is constitutional.
 4. The Supreme Court is the ultimate tribunal to decide disputes between the state and federal governments.
- In regard to the position of the Supreme Court, he said:

"So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force." Further, "Nor can it be inconsistent with the dignity of a sovereign state, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this union. On the contrary, the highest honor of sovereignty is untarnished faith."

In this able opinion, Taney equaled Marshall in his logic and vigor, while upholding the supremacy of federal jurisdiction under the courts. He pointed out in vigorous fashion the dangers attending an asserted supremacy by state courts over federal courts, and declared that supremacy must be connected with "permanent judicial authority," or controversies between the jurisdictions must be settled by force of arms. This was Taney's ablest decision.

Resolutions of the Wisconsin legislature. The legislature resolved, in substance, the following:

1. The assumption of jurisdiction by the federal judiciary was an act of undelegated power, and therefore without authority, void, and of no force.

2. It was an "arbitrary act of power, unauthorized by the Constitution, and virtually superseding the benefit of the writ of habeas corpus and prostrating the rights and liberties of the people at the foot of unlimited power."

3. The principle contended for, that the general government is the exclusive judge of the extent of the powers delegated to it, stops nothing short of despotism.

4. The states which formed the Constitution, "being sovereign and independent, have the unquestionable right to judge of its infraction; and that a positive defiance of these sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument, is the rightful remedy."

These resolutions were a restatement of the Virginia and Kentucky resolutions and of the New England and South Carolina doctrines of nullification. Booth's attorney, Byron Paine, was elected a member of the State Supreme Court, due to the wide attention attracted by this case.

Booth was arrested again in March, 1860, and he again sought a writ of habeas corpus in the State Supreme Court. He was rescued in August, and rearrested in October. Carl Schurz, retained as attorney, declared: "The Republican party went to the very verge of nullification, while the Democratic party . . . became an ardent defender of the Federal power."

Booth was eventually pardoned by President Buchanan.

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CHAPTER XXVI

THE CIVIL WAR CASES: THE PROTECTION OF PRIVATE RIGHTS AND THE MILITARY POWERS OF THE GOVERNMENT

I. *Ex parte Merryman* (Fed. Cas. No. 9, 487).

John Merryman, of Baltimore, was arrested on May 25, 1861, accused of hostile actions against the government of the United States. General Cadwalader placed him in Fort McHenry, under military control. Merryman appealed to Chief Justice Taney for a writ of habeas corpus. The writ was granted on May 27th. General Cadwalader refused to respond, on the ground that he was authorized by the President to suspend the writ of habeas corpus for the public safety. On the same day, a writ of attachment was issued by the Chief Justice in order to bring the General into court to answer for not producing the body of Merryman. May 28, the United States Marshal was prevented from entering the fort, and the writ was ignored.

Under the Constitution, it is provided that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." In pursuance of this provision, and to make it easier to take federal troops through Maryland, the writ was suspended on executive authority between Baltimore and Washington.

In a written opinion, Chief Justice Taney urged the following points:

1. The President not only claims the right to suspend the writ, but to delegate this power to a military officer,

who, under its protection, chooses not to obey judicial process.

2. The right to suspend the writ follows an enumeration of legislative—not executive—powers, and it is generally understood that Congress only can lawfully exercise the right.

3. No notice had been given that the President had assumed the power, or that it had been thus exercised.

4. If such a condition of affairs shall continue, “the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officers in whose military district he may happen to be found.” In justification of his position, Taney stated:

I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, to “take care that the laws be faithfully executed,” to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

Opinion of the Attorney-General. The Attorney-General, at the request of the President, submitted an opinion on the question embracing the following points:

1. When an insurrection threatens the existence of the nation, the President has the discretionary authority to arrest and detain “persons known to have criminal intercourse with the insurgents, or persons against whom

there is probable cause for suspicion of such criminal complicity."

2. The President has the power to suspend the privilege of the writ of habeas corpus as regards persons so apprehended, since he is charged under the Constitution to preserve the public safety, and is the sole judge of when an emergency exists requiring the suspension.

3. The President is answerable only to the high court of impeachment, and to no other tribunal, for his official conduct.

The President continued to suspend the writ, and denied the right of the judiciary to intervene. Indeed, in a proclamation issued February, 1862, he declared that the judicial machinery seemed designed "not to sustain the government, but to embarrass and betray it."

II. The Prize Cases (2 Black, 635).

The Brig Amy Warwick; the Schooner Crenshaw; the Schooner *Brillante*; the Bark *Hiawatha* (1863).

Certain goods and vessels were captured by Union gunboats charged with violating the blockade of Southern ports established by President Lincoln. Due to a general lessening of judicial authority on account of civil war, some of the justices were opposed to the President's method of conducting the war. The question was whether the President had the right to institute a blockade of ports controlled by persons in armed rebellion against the government. It was felt in certain quarters that the decision would be adverse to this exercise of power by the executive.

Decision of the Court. Has the government the power to establish a blockade of its own ports during a civil war?

May the President order such a blockade without an act of Congress declaring the existence of a state of war?

1. Under the Constitution, Congress alone has the right to declare a foreign or international war, but a civil war is a sudden and unexpected event.

2. Civil war is fact which the President must recognize.

3. The President must take care that the laws are faithfully executed.

4. The executive is compelled to deal with the situation without waiting for the Congress to act.

5. It is the President's duty to decide whether or not a blockade is a proper measure to oppose a rebellion. If he so decides, he has the clear right to institute it.

6. The President may by proclamation declare a state of war to exist where in his opinion the domestic strife has attained the proportions of a public conflict.

Concerning the status of the rebellion, the court declared:

After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a court to effect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war ever known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms. The law of nations is also called the law of nature; it is founded upon the common consent, as well as the common sense, of the world. It contains no such anomalous doctrines as that which this court is now for the first time desired to pronounce, to wit: that the insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities are not enemies, because they are traitors; and

a war levied on the government by traitors, in order to dismember and destroy it, is not a war, but an insurrection.

Dissenting opinion by Judge Nelson. This opinion, concurred in by Chief Justice Taney, and Justices Catron and Clifford, covered the following points:

1. The power to bring about a state of war is lodged in the Congress.

2. A war must be recognized or declared by the war-making power of the government, in order to exist legally.

3. The legal status of a government or the relations of its citizens from a state of peace to that of war cannot be changed by any lesser power.

4. The activities of the government preceding the formal declaration was a personal war, the actual state beginning only after the act of Congress of July 13, 1861, went into effect.

5. Under the Constitution, therefore, the President does not have the right to declare war, nor can he lawfully institute a blockade.

The proposition that the President may, at his discretion, by proclamation declare a state of war to exist, maintained by the majority, is questionable. This has never been understood to extend to an international war. From the standpoint of public policy, it seems best to leave to the President the form and extent of resistance to a rebellion, and to regard the acts of the political departments as final, and binding on the courts.

The government, while claiming the right to institute the blockade, denied that it conferred upon the insurrectionists the status of belligerents, and entitled them to the

rights of war. The recognition of the belligerency of the Confederate States by foreign maritime nations, through proclamations of neutrality, was protested by the federal government.

III. *Ex parte Milligan* (4 Wallace 2).

The legality of the military commissions constituted by President Lincoln, was first considered in the case of Charles L. Vallandigham, candidate for the democratic nomination for governor at the time General Burnside assumed command of the department of Ohio. The General issued an order commanding death as the penalty for all who declared sympathy for the enemy. Vallandigham was arrested for some radical statements made at a democratic mass meeting, and imprisoned. After trial, he was detained until the end of the war. Application was made to the Supreme Court for a writ of habeas corpus. The court held that it could not issue the writ, for under the Judiciary Act, its appellate jurisdiction extended only to appellate courts. In other words, the court had no power to review the proceedings of a military commission ordered by a military officer. Much criticism was leveled at the President for upholding the acts of these commissions. He replied that, notwithstanding his regard for individual rights, courts of justice could not deal with such cases adequately, and he must do what seemed required for the public safety.

One Milligan was arrested at the order of the commanding General of the military district of Indiana. He was tried by a military commission in October, 1864, charged with giving aid and comfort to the insurrectionists, conspiracy against the government, disloyal conduct, and violating the laws of war. He was adjudged guilty and sentenced to be hung on May 19, 1865. On May 10, he applied to the United States Circuit Court for the district of

Indiana. The judges disagreed, and the question of law was certified to the Supreme Court. The government was represented by Attorney-General James Speed, Henry Stanbery and Benjamin F. Butler. The prisoner was ably represented by David Dudley Field, General James A. Garfield, and Jeremiah S. Black.

The defense claimed that under the act of March 3, 1863, he could be brought before a military commission, which must either turn him over to the proper civil tribunal to be prosecuted according to the laws of the land, or release him. He sought release.

Decision of the court.

1. In states not invaded, and not engaged in rebellion, and where the civil courts are open, military commissions cannot be instituted to try, convict, or sentence anyone for a crime who was not a resident of a state in rebellion.

2. The power to institute such tribunals is limited to the actual theater of the war, where the civil courts are not open.

3. Congress cannot invest military courts under such conditions with such powers.

4. The Constitution guarantees to the individual the right of trial by jury, which can be denied only in the land and naval forces, and in the militia, in times of war or danger to the public.

5. The actual test is whether war is being carried on, and whether the courts are closed.

Judge Davis, who delivered the opinion, declared: "The Constitution of the United States is a law for rulers and people, equally, in war and peace, and covers with the

shield of its protection, all classes of men, at all times, and under all circumstances." The provisions, therefore, cannot "be suspended during any of the great exigencies of government."

The dissenting opinion. Chief Justice Chase delivered a dissenting opinion, concurred in by Judges Miller, Swayne, and Wayne, agreeing with the majority as regards the limitation of the power of the President in the case before the Court, but holding that such limitation did not extend to the Congress. The opinion stated:

1. That under the circumstances of this case, Congress had the power to institute military tribunals.
2. That the courts might be open and discharging their functions, and yet wholly incompetent to punish guilty conspirators with adequate promptitude and certainty.
3. "The power of Congress to authorize trials for crimes against the security and safety of the National forces may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

The majority opinion, giving practical effect to the right of the citizen to protection against arbitrary military action, has found a permanent place among those distinguished papers which, taken together, constitute the Charter of American liberties. Never in its history, however, was the court so bitterly assailed. The Reconstructionists and Radical Republicans declared that the doctrine of the court, if acted upon in war time, would have led to defeat. Moreover, they regarded the decision as upholding President

Johnson's efforts to checkmate the Congressional plans for reconstruction. In the opinion of many people in both parties, the court justified its high position by affirming the principle of law and order as against lawlessness and usurpation. The Democratic press praised the Supreme Court as an institution uncontaminated by the spirit of arbitrary proceedings, which threatened the existence of civil liberty. The press of the former Confederate states approved heartily of the decision, and referred to the position of the Supreme Court and the judiciary as the one department of the government which could rise above the passions of the hour, and effectively check the usurpations of power of other departments—a proposition strongly assailed by this press during the regime of John Marshall.

President Johnson, looking upon the decision as an approval of his plan to bring to an end military government in the South, dismissed trials of civilians pending in the states in which the Republicans still claimed a state of war existed. Some Republicans regarded the decision of the Court and the policy of Johnson as leading to the conclusion that the trial and conviction of Lincoln's murderers was illegal, and their execution as the result of lynch law.

Proposals were made designed to check the power of the court. John A. Bingham, Representative from Ohio, urged that the Court's appellate jurisdiction be taken away altogether and at once. Thomas Williams, of Pennsylvania, suggested that the concurrence of all the judges should be required to reach a decision on a constitutional question. George S. Boutwell, of Massachusetts, in an attempt to neutralize the decision of the court, introduced a bill providing that no person who had engaged in the rebellion or supported its cause should act as attorney in the courts of the United States. While these measures failed to pass, they manifested in a striking way the tendency of

the political departments to reduce the power and prestige of the Court when these departments failed to get their courses of action approved and sustained by the highest tribunal in the country.

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CHAPTER XXVII

THE LEGAL TENDER CASES

I. *Hepburn v. Griswold* (8 Wallace, 603).

Facts. On June 20, 1860, one Mrs. Hepburn made a promissory note payable to Henry Griswold on February 20, 1862, for \$11,250. Mrs. Hepburn failed to pay the note when due. Griswold sued to recover from Mrs. Hepburn. In 1864, she tendered \$12,720 in United States notes (greenbacks) as payment. Griswold refused to receive these notes, but they were tendered and paid by the court. The Kentucky Court of Appeals reversed the decision of the lower court. Mrs. Hepburn then appealed to the Supreme Court of the United States.

Decision of the Court. The court's decision was delivered by Chief Justice Chase. The doctrine of implied powers was generally admitted by the court. The decision embraced the following points:

1. While the legislature has unrestricted choice among all necessary and appropriate means to carry its powers into execution, it was the function of the court to determine whether the means chosen came within that category.

2. Contracts for the payment of money made prior to the act of 1862 referred to coined money, and could not be discharged, except as agreed otherwise, in anything but coin.

3. A law not made in pursuance of an express power, which necessarily, by its operation, impairs the obliga-

tion of contracts, conflicts with the spirit of the Constitution.

4. The Act of Congress which made greenbacks legal tender did not carry into effect any express power vested in Congress.

5. The Legal Tender Act, as applied to contracts prior to its enactment, was unconstitutional, for Congress had no power to declare the notes legal tender for such debts.

The dissenting opinion. Judges Miller, Swayne and Davis dissented. They accepted the general principle of implied powers agreed upon by the majority. They held:

1. That "this law was a necessity, in the most stringent sense in which that word can be used.

2. That the war brought into operation potent and expensive powers of belligerency.

3. Congress had the right to determine whether the issue of legal currency was necessary in order to carry on the war.

The decision in this case was awaited with interest and expectancy by the leading commercial classes, and by those who upheld or opposed the theory of dominant war powers of the government. Municipal corporations, public utility corporations, and debtors generally desired to discharge obligations contracted on a gold basis prior to the war, with depreciated currency amounting to legal tender. The banks and creditors wanted payment in gold, and opposed the government's asserted right to make paper currency legal tender.

The Court was for some time unable to come to a decision. The Act of 1866, passed to prevent President

Johnson from filling vacancies, had reduced the Supreme Court to eight members, thus making a deadlock possible. When Grant became President, the Court was increased to nine. Attorney-General Hoar was nominated by the President, but the Senate did not confirm him. Judge Grier resigned on December 15, 1869, to take effect February 1, 1870. Edwin M. Stanton was nominated in Grier's place and was immediately confirmed by the Senate, but he died four days after his nomination. The decision of the Court was announced on February 7, a few days after the resignation of Grier became effective. The Court, therefore, consisted of seven members, the Chief Justice and three of the judges upholding the opinion of the Court, and three dissenting. On the same day, Grant sent to the Senate the names of Joseph P. Bradley of New Jersey and William Strong of Pennsylvania to fill the vacancies made by the resignation of Grier and the death of Stanton. It was charged that Grant had advance information as to the decision of the Court, and that he "packed the Court" to secure a reversal. George S. Boutwell stated in his "Reminiscences of Sixty Years," that Chase had informed him of the conclusion of the Court two weeks before the decision was made. However, the President and members of the cabinet expressly denied the charge of advance knowledge. Time and circumstances have substantially confirmed this view.

An agitation took definite shape seeking a review of the question in connection with pending cases. The decision in *Hepburn v. Griswold* referred only to contracts entered into prior to the act, but the reasoning of the Court would make the law unconstitutional as regards contracts entered into after its enactment. The press was insistent upon a rehearing. The *New York Times* published editorials on the decision on February 8 and 9, 1870. On February 12,

the editor began to attack the Court. On March 18, the *Times* demanded the appointment of judges for the two vacant seats who would, the paper hoped, reverse the decision. On March 25, the *Times* attacked the Chief Justice. Strong was confirmed by the Senate on February 18, and Bradley on March 21. Four days after Bradley's confirmation and one day after taking his seat (March 25), the Attorney-General moved for reconsideration.

II. **Knox v. Lee (12 Wallace, 457).**

On April 30, 1870, the Supreme Court ordered the re-argument of this case. It concerned a confiscation law of one of the Southern states. The main question was the constitutional one: Are the legal tender acts valid as to all contracts, whether made before or after the act?

The decision of the Court. In this decision, the new judges, Strong and Bradley, joined with the minority in *Hepburn v. Griswold*, Swayne, Miller and Davis, and now formed the majority. The majority opinion covered five points:

1. The magnitude of the issue must be considered. Serious consequences might result from a different course.

2. The Constitution must be followed as the guide of the Court. The instrument itself contemplates a liberal interpretation of its own provisions.

3. Any act is constitutional unless it is an inappropriate means of carrying out powers conferred upon the Congress.

4. Are the acts forbidden by the spirit or letter of the Constitution?

a. Congress has power to coin money, and is not forbidden to issue paper money.

b. Prohibitions against the states are expressed, but none are even implied for Congress.

c. Do the legal tender acts violate the contract clause of the Constitution? It was held that they do not, for the debtors were still obligated to pay in money. Moreover, the federal government was not forbidden to impair contracts.

d. Are the acts in conflict with the "due process" clause of the Fifth Amendment? It was held that there was no violation. "It has never been supposed," said the court, "to have any bearing upon, or to inhibit laws that directly work harm and loss to individuals." Tariff and embargo laws were cited as examples.

e. The decision in the case of *Hepburn v. Griswold* was made by a divided court. Precedents were cited for overruling decisions.

5. The legal tender acts, therefore, are a lawful exercise by Congress of the war power, as regards all contracts, whether entered into before or after the enactment of the statutes.

Chief Justice Chase, and Judges Nelson, Clifford and Field dissented, holding to the majority position in the *Hepburn* case.

III. *Juilliard v. Greenman* (110 U. S., 421).

In 1878, Congress passed a law providing for the reissue of notes. The principal question in the case was whether or not a legal tender act, valid in time of war, was valid in time of peace. Judge Gray delivered the opinion of the court (Judge Field dissenting):

1. By grouping together all powers bearing directly on the subject, as laying and collecting taxes, paying the debt of the United States, and borrowing and coining money; and by adding powers incidental to the exercise of the great expressed powers, as chartering banks, emitting bills of credit, and providing a national currency, the court decided that making treasury notes legal tender was, within the meaning of the Constitution, "necessary and proper" for carrying into execution the powers vested by the Constitution in the government.

2. Paper money issued under the legal tender act is simply money raised for public use on a pledge of the public credit.

3. The power to borrow money includes the power to issue, in return for money borrowed, the obligations of the United States in any appropriate form. This embraces notes.

4. The power to issue notes is an attribute of sovereignty.

5. The power to issue notes being included in the power to borrow money and to establish a national currency, cannot be destroyed by the principle of the impairment of contracts.

6. Legal tender acts are valid in peace as well as war.

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CHAPTER XXVIII

THE FOURTEENTH AMENDMENT; ITS FRAMING, ADOPTION, AND INTERPRETATION

I. The Framing and Adoption.

The Fourteenth Amendment includes important provisions relating to: (1) citizenship, (2) privileges and immunities of citizens and due process of law, (3) apportionment of representatives in Congress among the states according to their respective numbers, (4) exclusion from office of persons who, having previously sworn to support the Constitution, had supported the rebellion, (5) the validation of debts incurred by the government during the Civil War, and the nullification of debts incurred in aid of the rebellion, and (6) power given Congress to enforce the provisions of the amendment by appropriate legislation.

The clause of greatest interest, generally called the "due process" clause, is that part of the first section which reads as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law." This part of the amendment was drafted by John A. Bingham of Ohio. Bingham had in mind the teachings of John Marshall. The protection of freedmen, ostensibly the purpose of the amendment, was merely the occasion of it. The effect of the amendment was to extend the power of the national government, and to subject many of the acts of states and municipalities to review by the federal courts. The radical leaders in Congress, while desiring to punish the South through the second, third, and fourth sections, and to elevate the position of the negro through the fifth

section (in addition to the Thirteenth and Fifteenth Amendments), also had in mind giving to the federal government, through section one, important powers heretofore enjoyed by the states. "They desired to nationalize all civil rights; to make the federal power supreme; and, to bring the private life of every citizen directly under the eye of Congress." Senator Roscoe Conkling declared the intent of the drafting committee was not only to raise the negro from bondage, but to include business interests and corporations seeking freedom from the interference of legislatures. The original proposal for the amendment was to this effect:

Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property.

This provision was forced to yield to the present one, on the ground that Congress would be authorized to invade the proper legislative sphere of the states. It is important only in showing the intent of the framers, which was finally realized in spite of the sacrifice in wording.

II. The Slaughter House Cases (16 Wallace, 36).

Facts. By act of March 8, 1869, the so-called "carpet-bag" legislature of Louisiana, through the influence of corruption and bribery, chartered the Crescent City Live-stock Landing and Slaughter-House Company, and granted a monopoly of the slaughter-house business within certain parishes of the City of New Orleans to this corporation. Other butchers in this district had to use its plants and pay a fee for their use. Certain butchers, following this outrage organized the Butchers' Benevolent Association, which sought to invalidate the charter. They claimed: 1. The

charter creates an involuntary servitude forbidden by the Thirteenth Amendment. 2. It abridges rights and immunities of citizens under the Fourteenth Amendment. 3. It denies equal protection of the laws. 4. It deprives the independent butchers of their property without due process of law. The validity of the law was upheld by the state court. The case was taken to the Supreme Court on a writ of error.

Decision of the court.

1. The Louisiana statute, in the light of the history, purpose, and "pervading spirit" of the Fourteenth Amendment, does not violate it in any particular.

2. Under the amendment, the citizen is protected only in rights and immunities which flow from citizenship in the United States. The citizen must look to the state for protection of privileges and immunities flowing from state citizenship.

3. The amendment, in defining a citizen of the United States, did not increase privileges and immunities enjoyed by a citizen before its adoption; and only such rights existing in the government, its national character, its Constitution, or its laws, were protected by the national government.

4. It was not intended to bring within the power of Congress or the jurisdiction of the Supreme Court "the entire domain of civil rights heretofore belonging exclusively to the states." To do so "would constitute this court a perpetual censor upon all legislation of the states on the civil rights of their own citizens."

5. The privilege to slaughter animals and the right to immunity from monopoly of any business is a privilege

or immunity flowing from state, and not national, citizenship.

6. To come within the purview of this provision, the action of a state must be directed by way of discrimination against the negroes as a class, or on account of their race.

The dissenting opinion. Judges Field, Swayne, Bradley, and Chief Justice Chase, dissenting, were of the opinion that the amendment should receive some construction which would make it effective, and this the majority opinion did not do. Such privileges and immunities as pertained only to citizens of the United States were adequately protected before the adoption of the Fourteenth Amendment. The monopoly was condemned as an indefensible violation of the rights of many for the benefit of a few. Moreover, such grants of exclusive privileges required no aid from a bill of rights to nullify them, and the plaintiffs were entitled to protection under the amendment. Said Judge Swayne:

By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the states. That want was intended to be supplied by this Amendment. Against the former, this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this aim of our jurisdiction is, in these cases, stricken down by the judgment just given.

III. *Munn v. Illinois* (94 U. S., 113), and the *Granger Cases*.

Chief Justice Chase died May 7, 1873. His work was mainly that of constitutional interpretations growing out of the problems of the war and reconstruction. It was a controversial period; and the validity of the court's claim to its position as final arbiter on constitutional questions,

to maintain the balance provided by the framers, was put severely to the test. The record of the court, in spite of bitter criticism, was an honorable one.

Chief Justice Waite began his work on March 4, 1874, and served from Grant's second term through Cleveland's second administration. With the war and reconstruction problems out of the way, Waite dealt in the main with new social and economic issues, as the Granger laws, the regulation of interstate commerce, the question of public utilities and rates, strikes and industrial conflicts, and many other cognate subjects.

The industrial situation forms the background of *Munn v. Illinois*. There was at the time a great financial and industrial crisis. Prior to this, great areas of land had been granted to the railroads. Much state legislation was directed against railroads and warehouses. In Illinois, a law was passed in 1871, in compliance with the new Illinois constitution of 1870, which required the state legislature to enact laws "for the protection of producers, shippers and receivers of grain and produce." By this statute, warehouses were made quasi-public service corporations. Warehouses of a certain class were required to take out a license and to maintain fixed maximum rates on storage of grain. The law was attacked as depriving of life, liberty and property without due process of law, under the fourteenth amendment. One of the lawyers for the plaintiff, quoting the Illinois Supreme Court, declared that a government without the power to regulate is but the shadow of a government, and a mockery.

Decision of the court. Chief Justice Waite read the decision. The main questions were whether or not the Illinois legislature had the power to fix rates, and the meaning

of the word "deprive" as used in the fourteenth amendment. The court decided:

1. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

2. The grain elevator business has been established for twenty years, has increased in magnitude until it has become a virtual monopoly, and affects the grain business in several states profoundly.

3. The whole public has a direct and positive interest in the business, and the Illinois statute merely extends the principle of public control to "this new development of commercial progress."

4. The possibility of abuse of this power is no argument against its existence.

5. "For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

The dissenting opinion. Judge Field, the only dissenting judge, held:

1. According to the majority opinion, property loses something of its private character when employed in such a way as to be generally useful.

2. The doctrine that property, used in such a way as to affect the community at large, is for this reason clothed with a public interest, destroys the efficacy of the constitutional guaranty.

3. The public has an interest in many private business enterprises, and to give the public the right to regulate the prices and rates of such businesses will destroy the rights of private property.

On the same day, the Illinois statute relating to the grain elevator rate, was upheld; laws establishing maximum passenger and freight rates on all railroads operating in Illinois, Minnesota, Iowa and Wisconsin were sustained by the Supreme Court. These cases, taken together, are popularly known as the *Granger Cases*. They involved the Fourteenth Amendment, the obligation of contract clause, and the commerce clause of the Constitution. The court was of the opinion that under the Constitution the police power of the state extended to the regulation of public corporations, and that this included the fixing of rates. In the opinion of Judge Field, who dissented, the court had not protected the stockholder from practical confiscation and the people from arbitrary and extortionate charges, but had merely applied the principle of *Munn v. Illinois*, and the wide scope of the decision would practically destroy "all the guaranties of the Constitution and of the common law." In the case of *Peik v. Chicago and Northwestern R. R.* (94 U. S. 164), a Wisconsin statute fixing rates for freight and passengers was upheld. The court declared that if the rates were just, an appeal for relief must be made to the legislature.

IV. *Chicago, Milwaukee & St. Paul R. R. v. Minnesota* (134 U. S. 418).

In 1887, the Minnesota legislature created a commission with authority to put into effect its own rates in case unequal or unreasonable rates were denied by railroads. This act differs from the previous ones in that a commission is

established with rate-fixing powers. The commission reduced the rate on milk over a portion of the defendant's line, and sought a writ of mandamus to enforce compliance with its regulation. The defendant contended that its existing rate was reasonable, and that the new one was a deprivation of property without due process of law. It was urged in favor of the railroad that the courts must act as arbiter between conflicting interests—in this case the railroad and the people. The State Supreme Court refused to permit the defendant to take testimony as to the unreasonableness of the new rate, and granted the writ of mandamus. The case was carried to the Supreme Court on writ of error.

Decision of the court:

1. "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination."

2. Where rates have been determined by legislative authority, depriving the railroad of its clear right to a judicial investigation of the reasonableness of the rates established, the act is void.

3. This case amounts to deprivation of the lawful use of property without due process of law, and a denial of the equal protection of the laws.

The dissenting opinion. Judges Bradley, Gray and Lamar dissented, laying down these propositions:

1. The regulation of such matters is a legislative act.

2. The legislature, and not the courts, is the final arbiter between such conflicting interests.

3. The problem of fixing railroad rates is an administrative, and not a judicial, duty.

4. There is no valid objection to the Minnesota law on the ground of its finality.

5. Deprivation of property by arbitrary process on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought.

6. "There was merely a regulation of the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction."

V. *Smyth v. Ames* (169 U. S. 145).

An act of the Nebraska legislature, passed in 1893, classified freights, fixed freight rates, and provided for a railroad commission with power to reduce rates in order to make them reasonable and just. The act also provided that the railroad could appeal to the courts against the regulation of the commission. An injunction was sought. Webster and W. J. Bryan appeared for the state, while J. C. Carter represented the railroads. The railway interests attempted to show that the railroads would have made their cost of operations had the rate of 1893 been in effect during the two preceding years. The railroads urged the following propositions:

1. Prices of carriage are everywhere fixed by the law of competition.

2. Railroads will charge all the traffic will bear, but the public is protected against extortionate rates.

3. It is not admissible to inquire of the cost of a particular service in order to fix rates.

4. Charging all the traffic will bear merely indicates to railroad managers the necessity of charging low rates.

Decision of the court. The court declared :

1. That a corporation is a person within the meaning of the "due process" clause of the fourteenth amendment.

2. That rates which will not allow such compensation as is just to the railroad and the public under all circumstances, amount to a deprivation of property without due process of law.

3. That rates are primarily for legislative determination, but are subject to judicial inquiry.

4. The proposition that a legislature, state or federal, can determine what is constitutional, is contrary to the entire theory of the American Constitution.

5. That reasonableness within the state must be determined apart from interstate commerce.

6. If the capital of the railroad is fictitious, it may not impose rates to earn dividends on an excessive capitalization. Stocks and bonds are not to be considered alone.

7. The public is fully protected if the business which is regulated is confined to the receipt of reasonable rates.

8. Reasonable rates are to be measured by operating expenses, plus a fair return upon the fair value of the property being used by the business for the convenience of the public.

9. In order to ascertain that value, the following factors are to be given such weight as may be just and right in each case.

- a. The original cost of construction.
- b. Cost of permanent improvements.
- c. Amount and market value of bonds and stock.
- d. Present as compared with the original cost of construction.
- e. Probable earning capacity under the rates fixed by law.
- f. Operating expenses.

Thus, the Nebraska law was held invalid, and the original position of court in *Munn v. Illinois*, was abandoned.

VI. *Lochner v. New York* (198 U. S. 45).

A law of the New York legislature prohibited anyone employed in a baking or confectionery establishment to work over 60 hours a week, or an average of 10 hours a day for the number of days employees worked. *Lochner* was arrested in Utica, N. Y., for violating this statute, and convicted in the county court. The conviction was affirmed by the Court of Appeals of New York. It was remanded to the original court for further proceedings, and was carried on writ of error to the Supreme Court of the United States.

Decision of the court.

1. The right to make a contract is a part of the liberty of the individual, protected by the fourteenth amendment.
2. The right to purchase or sell labor is part of the liberty protected by the amendment, unless circumstances exist which exclude the right.

3. The statute does not come under the legitimate public power of the state as a proper regulation of the safety, health, morals, and general welfare of the people.

4. The statute interferes with the right of liberty of contract, and is therefore void.

The dissenting opinion of Judge Holmes.

1. The liberty of the citizen to do as he likes, so long as he does not interfere with the liberty of others to do the same, is interfered with by many laws.

2. "The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."

3. Federal and state statutes cutting down the liberty to contract, have been sustained by the Supreme Court.

4. "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, or even shocking, ought not to conclude our judgment upon the questions whether statutes embodying them conflict with the Constitution of the United States."

5. "General principles do not decide concrete cases. The decision will depend upon a judgment or intuition more subtle than any particular major premise."

6. "I think that the word 'liberty,' in the fourteenth amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

VII. Civil Rights Cases (109 U. S. 3).

The Civil Rights Bill of 1875 guaranteed to all citizens of the United States full and equal enjoyment of the privileges of inns, conveyances, theaters, etc., and stipulated that such enjoyment should not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. Suit was brought against certain proprietors for violations of this act.

Decision of the court.

1. The denial of these privileges is not an indication of slavery or involuntary servitude.
2. The fourteenth amendment is a prohibition against states, not individuals.
3. No law has been made by the state abridging rights or denying equal privileges to citizens of the United States.
4. The acts complained of were committed by individuals, hence the case did not come within the meaning of the fourteenth amendment.

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CHAPTER XXIX

THE FIFTEENTH AMENDMENT

I. Suffrage regulations prior to the fifteenth amendment.

The first half of the nineteenth century was marked by the abolition of property qualifications on the part of the states. Suffrage reform, however, did not include the free negroes, except in a few states. With the freedom and citizenship of negroes guaranteed by the thirteenth and fourteenth amendments respectively, it was deemed necessary to introduce clauses into the latter amendment bearing on the suffrage question. It was provided in the Constitution that three-fifths of the slaves should be counted in determining the basis of a state's representation in the House of Representatives. Under the second section of the fourteenth amendment, representatives are apportioned among the states according to their total population, excluding Indians not taxed. Moreover, when the right to vote at a state or federal election is denied to an adult male citizen of a state, except for crime, the basis of representation for the state in Congress is to be proportionately reduced. A state might disfranchise any class of persons, but the state faced a loss of representation in Congress. These measures were regarded only as steps toward the enfranchisement of the negro, which was accomplished by the fifteenth amendment, adopted in 1870.

II. Provisions of the fifteenth amendment.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States

or by any of the states on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce the provisions of this article by appropriate legislation.

III. Interpretation of the fifteenth amendment.

A. *The Slaughter House Cases* (16 Wallace 36). Judge Miller, in rendering the decision in this, the first case to come before the Supreme Court under the "reconstruction amendments," explained the purpose of the fifteenth amendment in the following statement:

A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate to the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the fifteenth amendment. . . . The negro having by the fourteenth amendment been declared to be a citizen of the United States, is thus made a voter in every state of the union.

B. *Neal v. Delaware* (103 U. S. 370). The court decided that certain provisions of the Constitution and laws of Delaware, limiting jurors to white persons qualified to vote, were *ipso facto* annulled by the adoption of the fifteenth amendment.

C. *Ex parte Yarborough* (110 U. S. 651). A part of the Civil Rights Acts provided punishment for conspiracy "to injure, oppress, threaten or intim-

idate any person in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." A petition for a writ of habeas corpus to release several persons convicted in the United States Circuit Court for the Northern District of Georgia of conspiracy to intimidate a negro from voting at a congressional election, was made. The writ was denied.

Decision of the court.

1. The fifteenth amendment "does, *proprio vigore*, substantially confer upon the negro the right to vote, and Congress has the power to protect and enforce that right."

2. A vote for a member of Congress depends to some extent upon the Constitution of the United States, and not exclusively upon the laws of the state.

3. The power of Congress to protect the citizen in the enjoyment of his rights is "essential to the healthy organization of the government itself."

4. This portion of the Civil Rights Acts is a lawful use of the power granted to Congress to enforce the fifteenth amendment.

D. Williams v. Mississippi (170 U. S. 214). It was held in this case that a state may establish a literacy test for electors which applies to all persons, with no discrimination against colored persons as such, even though its application disfranchises more of one race than another. It follows, therefore, that the fifteenth amendment does not confer

suffrage directly upon the negro, and that it does not restrict qualifications of sex, age, education, property, or birth.

E. *The "grandfather clause."* This clause, adopted in several states, in effect excludes from suffrage practically all negroes who do not satisfy the educational and property tests, but includes a number of white persons who do not have these qualifications. Where a state, by statute or Constitution, excepts from the literacy test any person who was, on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and any lineal descendant of such person, the provision is unconstitutional on the ground that its purpose and effect is to disfranchise former negro slaves and their descendants, in violation of the fifteenth amendment. (*Guinn v. United States*, 238 U. S. 347; *Myers v. Anderson*, 238 U. S. 368.)

F. *Application and effect of the fifteenth amendment.* The fifteenth amendment, directed against the action of states, and not individuals, does not authorize federal legislation to punish conspiracy on the part of private persons to prevent negroes from voting. (*Jones v. Bowman*, 190 U. S. 127.)

This amendment limits the federal government as well as the states.

Congress may enforce the fifteenth amendment directly, but little has been done in this direction. Very few state acts have been found by the courts to violate it. The Southern states have succeeded

in limiting the right of the negro to vote through legislation which has been upheld by the Supreme Court.

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CHAPTER XXX

THE INCOME TAX CASES AND THE ADOPTION OF THE
SIXTEENTH AMENDMENT

I. The Constitutional provision regarding taxes.

The Constitution at first provided that representatives and direct taxes should be apportioned among the several states according to population. No capitation or direct tax could be laid, unless in proportion to the census arranged for in the Constitution. Moreover, Congress was given the power to lay and collect taxes, duties, imposts and excises. Duties, imposts and excises must be uniform throughout the United States.

The phrase "direct taxes" was coined by Gouverneur Morris during the Constitutional Convention. He desired that taxation should be in proportion to representation, and suggested that suffrage be restricted to landholders. Morris was interested especially in giving wealth its legitimate weight in representation.

II. *Hylton v. United States* (3 Dallas 171).

The Supreme Court held that an annual tax on a carriage for the conveyance of persons was constitutional, because it did not lay a direct tax. The judges inclined to the view that direct taxes included only capitation and land taxes. Hamilton, in his brief for the government, declared: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes."

Chief Justice Fuller, in the case of *Pollock v. Farmers' Loan and Trust Co.* (157 U. S. 429), declared that from the decision in the *Hylton* case, the following appeared:

1. The distinction between direct and indirect taxation was well understood by those who framed and adopted the Constitution.

2. Under the state systems of taxation, taxes on real estate or personal property, or the rents or income thereof were regarded as direct taxes.

3. The rules of apportionment and uniformity were adopted in view of that distinction and those systems.

4. Whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and as an excise.

5. The original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies.

III. *Springer v. United States* (102 U. S. 586).

The court considered the income tax law of 1865, passed following the Civil War to provide revenue to meet war expenses. The income in question was not derived from real estate, but in part from professional services as attorney at law, and in part from interest on United States bonds. The law was sustained on the ground that it was not a direct tax. The court declared: "Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains, is within the category of an excise or duty."

IV. *Pollock v. Farmers' Loan and Trust Co* (157 U. S. 429; second case, 158 U. S. 601).

The economic and political situation in 1894 was such that an income law was passed on August 27, designed to shift a part of the burden of taxation to the East. This law imposed a tax of two per cent upon incomes in excess of \$4,000 received by all persons, corporations, or associations (with certain exceptions) in the United States. Pollock, a stockholder in the defendant corporation, sought to enjoin the defendant from paying the tax on the ground of its unconstitutionality. The income of the corporation was derived principally from real estate, from municipal bonds, and from corporate stocks and bonds. Upon a dismissal of the bill on demurrer, an appeal was taken to the Supreme Court.

Decision of the court. In the first case, the majority of the court agreed upon the following conclusions:

1. A tax on income derived from real estate is a direct tax. Congress is, therefore, prohibited to lay such a tax.
2. A tax on income derived from state and municipal bonds was held invalid because it was a tax on the necessary instruments of government.

The court was equally divided on the following questions:

1. Whether a tax on income from corporate stocks and bonds or other personal property was a direct tax.
2. Whether the entire statute was invalid, due to the provisions expressly held so by the Supreme Court.

On May second, the court rendered its decision in the second case. The majority laid down these propositions:

1. Taxes upon real estate, or rents on real estate, are direct taxes.

2. Taxes on stocks and bonds, or other forms of personal property, or income from personal property, are direct taxes.

3. These taxes are invalid because they are unequal.

4. Since the largest part of the tax, that on capital, was inoperative, it was held that the remaining tax, that on incomes from occupations and labor, should fail also, on the ground that Congress could not have intended the latter tax alone.

V. The adoption of the sixteenth amendment.

Bitter attacks were made on the decision in the Pollock case. The case was cited as an illustration of the leanings of the court toward capital. A plank attacking the judiciary and the decision as favoring the so-called propertied class was inserted in the Democratic platform in 1896. Mr. Bryan charged that one judge (Shiras) changed his mind, and the tax was held invalid. Both the Democrats and the Populists made the income tax law an issue in the campaign. In 1908 the Democratic platform proposed an amendment to the Constitution allowing the laying of an income tax without regard to population. President Roosevelt had advocated an inheritance tax and an income tax in a message to Congress in 1907. An inheritance tax, passed in 1898 as a war measure, had been sustained, but was repealed. The aim of the Republicans was to silence Bryan by taking his policies. The conservative elements of the party dictated the platform, and nothing more was said about an income tax. Taft, in his speech of acceptance of the Republican nomination, declared himself to be personally in favor of an income tax. He was of the opinion that

a law could be framed which would meet the objections of the Supreme Court. In 1909, the Republican Congress proposed to attach an income tax clause to the general revenue bill in spite of the decision of the Supreme Court. A long debate followed, and President Taft proposed an income tax amendment, which was adopted in 1913. It reads:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

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CHAPTER XXXI

THE SEVENTEENTH AMENDMENT

The plan of the framers of the Constitution was to establish a permanent conservative element in the government. A simple majority at the polls was feared. The position of the "founding fathers" is stated in Number 10 of the *Federalist*. Popular election of Senators was proposed by Wilson, but it was finally agreed to leave their election to the state legislatures.

The popular election of presidential electors was introduced into all the states except South Carolina, during the Jeffersonian democracy, but, curiously enough, no demand was made for the popular election of Senators. A resolution providing for popular election was introduced during John Quincy Adams' administration, but little attention was given it. Andrew Johnson favored it as President. The subject was agitated to some extent during the Granger movement of the seventies. The Populists were the first to incorporate it as a plank in their platform in 1892. The Socialists followed in 1896, and the Democrats in 1900, and in following platforms. The matter became an issue in 1908. The Republican platform of that year was silent on the subject, but Taft declared himself as personally in favor of the principle.

An amendment called for by the House of Representatives passed by the necessary two-thirds vote in 1893. It passed in 1894, 1898, 1900, and periodically thereafter. The Senate persistently refused to give its consent. States then began to elect in effect by primary methods. Oregon in 1904 provided for the referendum, and for the election of Senators extra-officially. Members of the legislature promised to vote for the people's

choice. Senator Chamberlain, though a Democrat, was elected by a Republican legislature, due to the instructions coming from the people. By the year 1910, three-fourths of the states had adopted some form of primary election of Senators. Due to this extra-constitutional practice, the character of the Senate was correspondingly changed. The Senate approved the amendment in 1911, and it was ratified by the states in 1913.

The amendment provides that Senators shall be elected by the people of each state. Electors must have the same qualifications as electors of the most numerous branch of the state legislature. In case of vacancies, the governor of the state issues a writ of election to fill the vacancy. The state legislature may authorize the governor to make a temporary appointment until the election is held.

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Newberry v. United States, 256 U. S., 232.

CHAPTER XXXII

THE EIGHTEENTH AMENDMENT

I. Political aspects.

Several years preceding the Civil War, several states adopted prohibition in the wake of a very pronounced temperance movement. The interest in this question yielded to the dominant slavery issue and the Civil War. The Prohibition party definitely entered the political arena in 1872, by holding a national convention, drafting a platform, nominating a candidate, and, what is more important, organizing a political party. Candidates and platforms were submitted periodically thereafter, with little visible success. In time the prohibition issue was championed by leaders in the old parties, notably Mr. W. J. Bryan of Nebraska. The Anti-Saloon League was organized, its objective being the elimination of the saloon through state and local action. Many localities and a number of states entered the "dry column" through popular elections. Everywhere prohibition was an issue in local politics, and the communities of the nation rallied and fought under the "license" or "local option" camps.

Many prominent Americans who favored the principle of settling questions by localities, were not in sympathy with prohibition as a national issue. The nation, and even the states, was regarded as too large a unit. The most distinguished statesman holding to this theory was Mr. Woodrow Wilson, who championed the American doctrine of local self-government. It is one of the ironies of history that both war-time and constitutional prohibition were adopted during Mr. Wilson's second administration.

Up to 1917, eleven states had constitutional prohibition, ten states had statutory prohibition, and five others had prohibition laws or amendments under way. In 1917, Congress forbade the manufacturing and importation of spirituous liquor for beverage purposes during the period of the war.

II. The adoption of the amendment.

In December, 1917, Congress adopted the prohibition amendment to the Constitution and submitted it to the states. It was ratified by forty-six states, proclaimed in January, 1919, and put into effect by its own provisions January 16, 1920. The amendment reads:

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

III. Interpretation of the eighteenth amendment.

A. National Prohibition Cases (253 U. S. 221). In these cases, the constitutionality of a constitutional amendment was definitely attacked. The general contention was that the eighteenth amendment had overridden the implied limitations of the amending power under the Constitution. The following contentions and answers were submitted to the Supreme Court:

1. The so-called eighteenth amendment is not really an amendment, the function of which is to change or improve existing provisions of the Constitution, and not to add grants of power hitherto unknown to the Constitution.

An examination of the records of the Constitutional Convention and of the ratifying convention disclosed that the framers intended that changes of any kind mustering the requisite support could be made at any time, excluding those expressly excepted in the amending clause.

2. The eighteenth amendment is not an amendment within the meaning of the Constitution, for the reason that it is in its nature legislation. An amendment to the Constitution can deal only with the powers of government. Action directly upon the rights of individuals is essentially a legislative power.

In reply, it was contended that this proposition pointed to what the amendment should or should not be, rather than to what amendments were constitutionally possible to adopt. The thirteenth amendment was cited as an example of an amendment directed against individuals, even to the extent of depriving them of property.

3. "The Constitution in all its parts looks to an indestructible union of indestructible states."

a. This view is the basis of the Union, and any attempt to change it through amendment is beyond the power conferred by the fifth article of the Constitution.

b. The delegated amending power cannot extend to anything which would lead to the destruction of either the United States or the individual states.

c. The states can, through the police power, protect the health, safety, morals and general welfare of their citizens. Prohibition is included under the police power, and the states only can legislate respecting it.

d. If a part of the police power can be transferred to the federal government, the residue of police power and other fundamental state powers can be so transferred, which will make possible the destruction of the states by constitutional amendment.

e. The first ten amendments limited the amending power, especially as regards the rights retained by the people, and the powers reserved to the states or to the people.

In answer to the third contention, it was urged that an unalterable governmental system was not in the minds of the framers, but they definitely intended to provide a means for necessary changes. It was pointed out that Sherman feared that three-fourths of the states might abolish certain states altogether, or deprive them of their equality in the Senate. Accordingly he moved that no state should be affected in its internal police or deprived of its equal suffrage in the Senate, which was lost. The ninth and tenth amendments were regarded merely as a part of the Constitution, and subject to amendment. The fourteenth amendment was held up as a precedent for limiting the police power of the states through an amendment to the Constitution.

While these cases might properly be discussed under the amending clause, it settled that amendments of a moral character may find a definite place in the Constitution. On this point, the court declared:

The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage

purposes, as embodied in the eighteenth amendment, is within the power to amend reserved by Article V of the Constitution.

The Supreme Court, in addition to upholding the constitutionality of the amendment, maintained these propositions :

1. The concurrent power of enforcement conferred upon Congress and the states does not enable either to defeat or thwart the prohibition, but only to enforce it by appropriate means.

2. The term "concurrent power" does not mean joint power, or state approval of congressional enforcement legislation, or a division of power similar to that which distinguishes foreign and interstate commerce from intrastate affairs.

3. The power given Congress by the second section, while not exclusive, is territorially co-extensive with the prohibition of the first section. It is not dependent on or affected by action or inaction on the part of any or all of the states.

IV. Application and effect of the eighteenth amendment.

The amendment does not state what percentage of alcohol is required to make a beverage intoxicating. Many people contended that liquors containing three per cent, or even more, alcohol were not intoxicating. The enforcement law, commonly called the "Volstead Act," placed the maximum percentage of alcohol at one-half of one per cent. Moreover, the office of prohibition commissioner was created, in the internal revenue bureau of the Treasury department, charged with the large responsibility of enforcing prohibition. In regard to the definition of intoxicating liquors by the Volstead Act, the Supreme Court said :

While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, Sec. 1), wherein liquors containing as much as one-half of one per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power.¹

Concerning the effect of the eighteenth amendment, that acute observer of American politics, Professor Charles A. Beard, has significantly remarked:

Naturally, a law striking at the root of such age-long habits, is the subject of much adverse criticism. It is repeatedly said that the Amendment was "forced upon the people"; but it must be remembered that three-fourths of the states were already "dry" by popular vote and that forty-six out of forty-eight states ratified the Eighteenth Amendment. It is said that the law cannot be enforced; that is a matter of degree and of administration. As the agents chosen to enforce the act were selected in accordance with the letter and spirit of the spoils system, it is not surprising that there has been great inefficiency, to say the least. Still, during the eighteen months ending December 31, 1922, there were more than 27,000 convictions under the Volstead Act, and over \$5,000,000 was collected in fines. It may be, as alleged, that the Volstead Act is unduly stringent in its definition of intoxicating liquor and that modifications of that ruling are forthcoming, but notwithstanding all the scandals and excitement connected with "rum running" and "bootlegging," there are no signs of a return to the old days of the wide-open saloon.²

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National Prohibition Cases, 253 U. S., 221.

Ruppert v. Caffey, 251 U. S., 264.

Dillon v. Gloss, 256 U. S., 368.

Cunard Steamship Company v. Mellon, 262 U. S., 100.

¹National Prohibition cases (1920) 253 U. S. 350, 387.

²Beard, *American Government and Politics* (4th ed.) pp. 404-405.

CHAPTER XXXIII

THE NINETEENTH AMENDMENT

I. *Minor v. Happersett* (21 Wallace 162) and the fourteenth amendment.

One Mrs. Minor sued the registrar of voters of a Missouri district for refusing to place her name on the eligibility list of persons to vote for presidential electors and other officers. She was born in the United States, subject to its jurisdiction, and had all voting qualifications except that of sex. Under the Missouri Constitution, suffrage was limited to adult males. Mrs. Minor contended that one of her privileges as a citizen was the right to vote, and that under the fourteenth amendment this right had been abridged by the act of the registrar of voters.

Decision of the court.

1. Mrs. Minor's citizenship was established.
2. Her citizenship did not necessarily flow from the fourteenth amendment.
3. The right to vote was not necessarily a privilege or immunity before the adoption of the amendment.
4. The amendment only guaranteed such privileges and immunities as the citizen enjoyed when adopted, and did not create new ones.
5. Suffrage was not one of the existing privileges.
6. The states, and not the United States, could qualify voters.

7. There was no invasion of Mrs. Minor's privileges or immunities as a citizen of the United States by the registrar's act.

II. Political phases of the amendment.

The woman suffrage movement, like the prohibition movement, gathered momentum slowly but surely. New Jersey allowed women to vote before the end of the eighteenth century. In 1838, Kentucky allowed women to vote in school elections. Kansas followed in 1861. In 1869, the territory of Wyoming gave women the same rights as men in elections for territorial officers. By the end of the nineteenth century, Colorado, Idaho, Wyoming and Utah had adopted woman suffrage. The "Susan B. Anthony" amendment was introduced in Congress as early as 1868. At first, it gained little support. Ridicule was the first reward. The advocates of the measure contended that most women have the same interests as men, in that they are property owners, tax-payers, professional workers or wage earners. Moreover, woman suffrage is essential to sex equality. Women, it was declared, would have a purifying influence on politics. The opponents hotly replied that women belonged in the home; that they are adequately represented at the polls by their fathers, brothers, and husbands; that women can accomplish more through non-political means than through political activity; that the interest in voting would subside along with the novelty of the thing; and that an increase in the electorate would increase expenditures.

Failing national action, the supporters of the measure gave their attention to the states. By the year 1917, twelve states had admitted women to vote at all elections, and many others had provided a limited franchise for women. The leading parties in 1916 endorsed equal suffrage

through state action. The Progressive party championed the enfranchisement of women by national action. President Wilson, during his first administration, declared that as the leader of the Democratic party, he was bound by the position of the party on this question, irrespective of his position personally. Later, after war had been declared against Germany, he asked the Congress in a special message to submit a suffrage amendment, declaring that the country needed the help of its women, and without them "we are only half free." On June 4, 1919, the Nineteenth Amendment was adopted by Congress, and on August 28, 1920, the necessary three-fourths of the states was completed by the ratification of Tennessee. It became effective immediately.

III. Provisions of the amendment.

The amendment reads :

The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of sex.

Congress shall have power to enforce the provisions of this article by appropriate legislation.

READING

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BEARD, C. A. and M. R.—*History of the United States*, pp. 554-568.

Leser v. Garnett, 258 U. S., 130.

Fairchild v. Hughes, 258 U. S., 126.

Hawke v. Smith, 253 U. S., 231.

✓ CHAPTER XXXIV

RECENT AND CONTEMPORARY CONSTITUTIONAL CONTROVERSIES

I. The proposed child labor amendment.

A. Political aspects. The regulation and prevention of child labor has been agitated by reformers for many years. Only within the last decade has the question received the direct attention of the government of the United States. The greatest opposition to the reform came from certain states in the South where large numbers of children are employed in cotton mills. Notwithstanding this opposition, two laws were passed during the administrations of Woodrow Wilson, designed to control the employment of children. The law of 1916 established a national age limit for children employed in industry. The law of 1919 laid a heavy tax on the profits of companies using child labor. Both were held unconstitutional. The supporters of the measure then turned to their only remaining remedy—an amendment to the Constitution.

A proposal was presented to Congress for an amendment which would authorize a child labor law. President Coolidge, in his first message to Congress, December, 1923, gave the measure his unqualified endorsement. An extended discussion followed, with the result that the measure was adopted by both houses of the Congress, and now

awaits ratification by the states. The Republican national platform of 1924 commended the "Congress for its prompt adoption of the recommendation of President Coolidge for a constitutional amendment authorizing Congress to legislate on the subject of child labor and we urge the prompt consideration of that amendment by the legislatures of the various states." President Coolidge, in his speech of August 15, 1924, accepting the Republican nomination for the Presidency, declared:

Our different States have had different standards, or no standards at all, for child labor. The Congress should have authority to provide a uniform law applicable to the whole nation, which will protect childhood. Our country cannot afford to let anyone live off the earnings of its youth of tender years. Their places are not in the factory, but in the school, that the men and women of tomorrow may reach a higher state of existence and the nation a higher standard of citizenship.

The actual status of child labor in the United States is disclosed by the census of 1920. More than a million children were then employed in the so-called gainful occupations. Four hundred thousand between the ages of ten and thirteen are so employed. The proportion of children employed between the ages of ten and fifteen reaches about twenty-five per cent in certain Southern states, as Alabama, Mississippi, and South Carolina, and declines to three per cent in the Pacific coast states. It is clear that this practice can only be remedied by federal action.

B. *Hammer v. Dagenhart* (247 U. S., 251). The Child Labor Act of 1916 prohibited any goods from being transported from one state to another if

manufactured in any establishment where child labor under a certain age limit was employed. The decision of the court, holding the law unconstitutional, was as follows:

1. The prohibition or limitation of child labor in mines and factories, while desirable, must be decided by each state for itself.

2. Congress cannot fix age limits for children employed within a state.

3. The states of the North may fix their age limit for children to labor at 18, if they so desire; but this should not interfere with the right of the Southern states to fix the age at 12.

4. Congress has full power to regulate commerce, but cannot prescribe how states shall exercise their own police powers within their own borders.

5. Congress cannot exclude from the privilege of interstate commerce those who engage in the manufacture of legitimate commodities within a state where labor conditions differ from those prescribed by the Congress.

6. The law usurps powers reserved to the states under the tenth amendment. To uphold this principle would eliminate the control of states over local matters, and the dual system of government would be destroyed.

C. Bailey v. Drexel Furniture Co. (259 U. S. 20). The Child Labor Act of February 24, 1919, imposed a tax of ten per cent on the net annual income of a person who employs one child or more in any mine or factory of the United States for even a single day. Chief Justice Taft delivered the opinion of the Court:

1. "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by use of the so-called tax as a penalty? . . . a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

2. Grant such powers to Congress as this law implies, with its detailed regulatory features; "such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

3. The difference between a tax and a penalty is sometimes difficult to define, yet the point is reached in some cases where "the so-called tax loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."

4. The law before the court imposes such a tax, and cannot be sustained under either the tax or commerce clauses. Moreover, it is expressly prohibited by the tenth amendment.

D. Text of the proposed amendment:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

II. The Constitution and social legislation.

A. *The problem.* The courts generally, and the Supreme Court of the United States in particular, have been criticised for being reactionary, and represented as opposed to advanced social legislation. Professor Frank J. Goodnow published, in 1911, a book entitled *Social Reform and the Constitution*, the purpose of which was to ascertain "to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures which have been made parts of the reform program of the most progressive peoples of the present day." In this volume, Professor Goodnow states the demands of social and political reform in the United States, and by an actual examination of cases germane to the subject, discloses the extent of constitutional hindrance to social reform. His discussion embraces the following subjects: the constitutionality of uniform commercial regulation; the power of Congress to charter interstate commerce corporations; the power of Congress over the private law in force in the United States; the constitutionality of political reform; the constitutionality of government regulation; the constitutionality of government aid; and the attitude of the courts towards measures of social reform. In conclusion, he points out that criticism of the courts is no novel thing in our history, and cites instances to uphold this view. In regard to the effect of criticism of the court and its place in bringing about necessary social change, he said:

It is by no means improbable that this severe, persistent, and continuous criticism of the court has been one

of the influences which have brought it about that the court has on the whole been reasonably responsive to public opinion. In these days of rapid economic and social change, when it is more necessary than ever before that our law should be flexible and adapt itself with reasonable celerity to the changing phenomena of life, it is on this criticism amply justified by our history that we must rely if we are to hope for that orderly and progressive development which we regard as characteristic of modern civilization.

Woodrow Wilson has dealt with the question of criticism of the Constitution in the following words:

The charm of our constitutional ideal has now been long enough wound up to enable sober men who do not believe in political witchcraft to judge what it has accomplished, and is likely still to accomplish, without further winding. The Constitution is not honored by blind worship. The more open-eyed we become, as a nation, to its defects, and the prompter we grow in applying with the unhesitating courage of conviction all thoroughly-tested or well-considered expedients necessary to make self-government among us a straight-forward thing of simple method, single, unstinted power, and clear responsibility, the nearer we will approach to the sound sense and practical genius of the great and honorable statesmen of 1787. And the first step towards emancipation from the timidity and false pride which have led us to seek to thrive despite the defects of our national system rather than seem to deny its perfection, is a fearless criticism of that system. When we shall have examined all its parts without sentiment, and gauged all its functions by the standards of practical common sense, we shall have established anew our right to the claim of political sagacity; and it will remain only to act intelligently upon what our opened eyes have seen in order to prove again the justice of our claim to political genius.¹

B. Adair v. United States (208 U. S. 161). In 1898 Congress passed a law forbidding railroads from discharging or discriminating against any em-

¹*Congressional Government*, pp. 332-333.

ployee because of membership in a labor union. The court maintained that every person has the right to buy or sell the labor of others or of himself, subject only to such restraints as contributed to the safety of the general public. No one was obliged under compulsion to accept or retain the employment of another, nor need anyone remain in the employ of another. A railroad can discharge a union man without assigning a reason. The law was held to deprive the employer of his liberty of contract without due process of law, and therefore void.

C. *Bunting v. Oregon* (243 U. S. 426). A statute of the Oregon legislature fixed hours of labor at ten hours a day, and limited overtime to three hours a day with pay at the rate of time and one-half. The law was held constitutional. The argument in the case was sociological rather than legal. A brief, prepared in the main by Mr. Brandeis before he became an associate justice, gave a comprehensive review of legislation dealing with hours of labor, and information concerning the effect of fatigue and overwork on employees.

D. *Adkins v. Children's Hospital* (261 U. S. 525). The Minimum Wage Act for women and children in the District of Columbia was passed September 19, 1918. A board of three members was provided for, with power to fix wages for women and children, and stipulating fine and imprisonment for anyone paying less than the fixed wage.

A number of women were employed by a children's hospital at satisfactory wages. A woman was employed by a hotel company as elevator

operator. She received \$35 a month, and two meals a day. This was less than the minimum wage fixed by the board. The hotel company, not willing to pay more, and risking fine and imprisonment in case of her retention, intended to discharge her. She sought to enjoin her discharge, claiming that the minimum wage act would deprive her of her employment and wages without due process of law.

The Court held that the fifth amendment guaranteed to the individual the liberty to contract about one's own affairs, and that the minimum wage law interfered with this liberty. While recognizing that the right to contract was not absolute, and was subject to limitations, no circumstances existed in this case to justify limitation of the liberty.

III. Congressional claims to supremacy.

Prominent members of Congress have at times asserted the supremacy of Congress over the Supreme Court. These pretensions are illustrated by a statement by Senator Robert L. Owen, of Oklahoma, setting forth his views on this subject. At a meeting of the Lawyer's Club of New York City in 1917, Dr. David Jayne Hill referred to Senator Owen as the leader of those who would "practically abolish the Supreme Court." The New York State Bar Association, at its fortieth annual meeting (1917) declared it "astounding" that there was a man in the United States Senate who held such views on the Supreme Court as did Senator Owen. The Senator issued the following statement in reply:

Dr. David Jayne Hill is reported in *The Times* of today, as attacking before the Lawyers' Club, those who would abolish the

Supreme Court and mentioning Senator Owen as a leader in the movement.

The suggestion that I would abolish the Supreme Court is unfounded in fact. It is difficult for Dr. Hill to be patient with a public servant who believes in "popular government."

My views on the Supreme Court will soon be presented on the floor of the Senate, in which I shall point out that the Sovereign power of the United States is vested in Congress, that its laws are "the supreme law of the land"; that the Congress, by the Constitution, is exclusively vested with the powers and duty of determining the constitutionality of its own acts; that the passage by Congress of an act establishes the conclusive presumption of the constitutionality of the act; that the power of correcting an error by Congress is exclusively vested in the people of the United States, in whom alone is vested sovereignty; that their sovereignty by the Constitutions of the forty-eight States, by the Declaration of Independence, and by the Constitution of the United States is indefeasible and inalienable; that the Constitution of the United States did not vest the exercise of this power of sovereignty in the courts, but made the courts subject to Congress; that the Congress under the Constitution itself is authorized:

First—To fix the appellate jurisdiction the Supreme Court may be empowered to exercise and to make any exceptions it pleases.

Second—To determine the regulations under which appeals may be made to the Supreme Court.

Third—The appellate jurisdiction given by the statutory authority of Congress is substantially the only jurisdiction the Supreme Court enjoys.

Fourth—That the number of Judges of the Supreme Court is subject to Congress.

Fifth—That the compensation of these Judges is fixed by Congress.

Sixth—That its court room, its Marshal, its Clerk, its library, its officials of high and low degree are controlled by Congress.

Seventh—That its means of enforcing its decrees are provided by Congress.

Eighth—That its personnel is only permitted on the advice and consent of the Senate, a branch of Congress.

Ninth—That its membership is subject to instant removal by Congress by impeachment.

Tenth—That the "good behavior" of its members, required by the Constitution as a condition of remaining in the public service,

is not subject to its own self-serving determination, but is subject to the judgment of the law-making power of the people.

Eleventh—That the entire inferior federal judiciary and its jurisdiction is statutory and subject to Congress.

The Executive Department, except the President and Vice-President, is statutory and the President and Vice-President are sworn to obey the laws of Congress and are subject to impeachment by Congress.

The judiciary is merely a means of advising the Executive as to the meaning of the laws of Congress and a means of providing remedies for grievances of citizens under the laws.

The judiciary is not a co-equal, but a highly honorable, justly honored and revered subordinate branch of the Federal Government, with a splendid history and a glorious future.

The Supreme Court has had and will forever continue to have an honored place in the service of the people. No thoughtful man wishes to impair its Constitutional jurisdiction, but its recent assumption of the right to invade the powers of Congress to make law, as in the Standard Oil and American Tobacco cases, or to set aside as void laws of Congress, as in the legal tender and Income Tax cases, and to assume the power of fixing national policies is a violation of the Constitution itself and will not be endured by a free people.

The courts of the great nations of the world never think of setting aside the Acts of Parliament of such nations, nor would it be endured. The Parliaments of New Zealand, of Australia, of the Republic of South Africa, of Great Britain, of France, of Switzerland, of Denmark, determine the constitutionality of their own acts and are responsible to the people at home, whose sworn representatives they are. These great precedents are based on common sense and on that natural structure of society, and are not accidental.

The question at issue is not the wisdom or patriotism of Congress, but the power of Congress under the Constitution, and no suggestion that Dr. Hill or his sympathizers may make that Congress is composed of unlearned, foolish, or unpatriotic men will affect the issue.

The wisdom and patriotism of Congress needs no defense. It represents the wisdom and patriotism of the people of the United States, in whom is vested an inalienable, indefeasible sovereignty, and this must suffice.

Thomas Jefferson, United States Supreme Court Justices Harlan, Brown, Jackson, and many others support my view, as I

believe the overwhelming majority of the people will do when they know the facts.

IV. Recall of Judges and of Judicial Decisions.

The recall, based upon the principle that elected officers—agents of the people—should be subject to the constant danger of appraisal with a view to retention or dismissal, has been extended to the judiciary. The recall first appeared in the Los Angeles city charter in 1903. It was adopted in Oregon in 1908, in California in 1911, in Arizona, Idaho, Washington, Colorado and Nevada in 1912, in Michigan in 1913, and in Louisiana, North Dakota, and Kansas in 1914. Most of these states have applied the recall to all elective officials. Certain ones, such as Wisconsin and Washington, have excepted judges from the operation of the law. Arizona, upon applying for admission to the union, had a section in its Constitution providing for the recall of judges. Mr. Taft vetoed the enabling act, laying down the doctrine in his veto message that it is the function of the courts to make valid the action of the government against the majority. In his opinion, the Constitution is the will of the whole people, who are bound by it. After admission to the Union, without the recall provision, Arizona so amended her Constitution as to include it. Advocates of the recall pointed to its application to delegates under the Articles of Confederation as proof of its lack of novelty.

Mr. Theodore Roosevelt advocated the recall of judicial decisions instead of judges. In support of this position, he declared: "I am proposing merely that, in a certain class of cases, involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law—which would depend, as Justice Holmes so well

phrases it, upon the prevailing morality or preponderant opinion—be submitted for final determination to a vote of the people, taken after due time for consideration. And I contend that the people, in the nature of things, must be better judges of what is the preponderant opinion than the courts, and that the courts should not be allowed to reverse the political philosophy of the people.” The Progressive platform of 1912 included the following plank in regard to the courts :

The Progressive party demands such restriction of the power of the courts as provide: 1. That when an act passed under the police power of the state is held unconstitutional under the state Constitution by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become law, notwithstanding such decision. 2. That every decision of the highest appellate court of a state declaring an act of the legislature unconstitutional on the ground of its violation of the federal constitution, shall be subject to the same review by the supreme court of the United States as is now accorded to decisions sustaining such legislation.

V. Suggested Changes in the Amending Process.

Progressive and radical leaders in the United States have advocated such alterations in the amending process as will render the Constitution more easily and readily amendable than is now the case under the fifth article. It is urged on the part of those in favor of this reform that years must pass before the amending power will act upon a proposal which has become in effect a national issue. Moreover, where changes are proposed which affect one of the agencies of government charged with the power of amendment, it is difficult to accomplish even the submission of the amendment to the states for ratification. The seventeenth amendment is cited in support of this contention.

Mr. Roosevelt, at the Progressive Convention at Chicago in 1912, recommended “the establishment of machinery for

making much easier of amendment both the national and the several state constitutions, especially with the view of prompt action on certain judicial decisions—action as specific and limited as that taken by the passage of the eleventh amendment to the national constitution.” The platform of the Progressive party favored a more easy and expeditious method of amending the Constitution. The La Follette platform proposed that amendments be initiated by a majority in Congress, or by ten states through their legislatures, or through a majority of electors voting on the question in each state. The amendments should be ratified both by a majority of the states and a majority of the votes cast in the country voting on the question of ratification. Mr. William Jennings Bryan, in an address delivered during Constitution Week at the Los Angeles City Club, suggested that an amendment be proposed by a majority of both houses of Congress, and ratified by a majority of the states.

It has been pointed out that states as units in the federal system, rather than population, have most to do with the business of amending the Constitution. It is possible for thirteen states to withhold consent from any proposed change in the Constitution. As Professor Beard has indicated, thirteen states, rightly distributed, with one-tenth of the population of the country, can prevent nine-tenths of the people and all the remaining states from making desired changes.

It is urged by conservative leaders and interests, on the other hand, that a combination of three-fourths of the states may force undesirable amendments on one-half the population of the country inhabiting the larger states. It is further contended that the recent amendments to the Constitution have introduced provisions which are foreign to the nature of the instrument and to the intent of the

framers, which are legislative in character, and which invade the powers reserved to the states. The National Prohibition cases, discussed under another heading, settled that any amendment might be made other than clauses which are expressly excepted by the Constitution itself.

The claim is made that a small number of men participate in the amendment process when accomplished through the state and national legislatures. Lobbies and organizations with money and paid workers can threaten legislators with political extinction unless the amendment is initiated and ratified. Then, members of the legislatures are elected for other purposes. The use of the convention system, both in proposal and ratification, would, in the opinion of certain writers, obviate these objections.

VI. Five-to-Four Decisions.

The Supreme Court has held unconstitutional Acts of Congress by five-to-four decisions in the following cases:

A. *Ex parte Garland* (4 Wallace 333). On January 24, 1865, Congress prohibited all persons from practicing before the federal courts without taking a specified oath. Garland had been a member of the Confederate congress. He was pardoned by the President and admitted to practice before the Supreme Court. The act was held to be *ex post facto* and an interference with the power of the President to pardon.

B. *Pollock v. Farmers' Loan and Trust Company* (157 U. S. 429; 158 U. S. 601). The Act of August 27, 1894, laid taxes on rents or income derived from real estate, or from the interest on municipal bonds. The court held that a tax on the income from real estate was a direct tax within the

meaning of the Constitution, and that a tax on municipal bonds was a tax on the power of the state to borrow money. Moreover, a tax on income from personal property was a direct tax. The statute being unconstitutional in these particulars, was unconstitutional in all its parts.

- C. *Fairbank v. United States* (181 U. S. 283). This involved the act of June 13, 1898. A stamp tax on foreign bills of lading was held to be in effect a duty on exports.
- D. *Employers' Liability Cases* (207 U. S. 463). Under the act of June 11, 1906, interstate carriers were made liable to employees for injuries due to negligence and insufficient construction. The court held that the act covered cases occurring within the limits of a single state over which Congress had no jurisdiction under the commerce clause.
- E. *Hammer v. Dagenhart* (247 U. S. 251). The act of September 1, 1916, excluded from interstate commerce articles made in establishments employing child labor. It was held that the statute amounted to a regulation of hours for labor solely within the authority of the state and beyond the scope of the commerce clause.
- F. *Eisner v. Macomber* (252 U. S. 189). An Act of September 8, 1916, defined the word "dividends" subject to the income tax as including any distribution to shareholders out of the earnings or profits accrued, whether in cash or in stock of the corporation. The court held that accumulations of profits in this manner, in the form of stock divi-

dends, were not real dividends but a capital interest, and therefore was not a tax on incomes.

G. *Knickerbocker Ice Co. v. Stewart* (253 U. S. 149).

On October 6, 1917, Congress decreed that in all civil cases of admiralty and maritime jurisdiction there should be saved to claimants the rights and remedies under the workmen's compensation law of any state. This was held to be an unwarranted delegation to the states of legislative power of Congress under Article I, Section 8, Clause 18, and Article III, Section 2 of the Constitution.

H. *Newberry v. United States* (256 U. S. 232).

The Corrupt Practices Act of June 25, 1910, limited the amount of money any candidate for the Senate or House could give, expend, use, promise, cause to be given, or contributed in gaining his nomination or election. The Court held that Congress could regulate only the manner of holding the election. This does not include the selection of a candidate who will later run for election.

I. *Adkins v. Children's Hospital* (261 U. S. 525).

By Act of September 19, 1918, a minimum wage act was passed for the District of Columbia. A board was set up with power to fix wages for women and children, and punishment was provided for those charging less than the fixed wage. It was held that the law interfered with the liberty to contract guaranteed by the Fifth Amendment.

A proposal has recently been made in the Senate that a law be passed by Congress forbidding the Supreme Court further to hold an act of Congress unconstitutional by a majority, or a five to four vote. It is urged that at least

seven of the nine justices should agree to a decision which has this effect.¹ Proponents of this measure believe that it will cut down the number of laws held invalid, and continue in effect laws which a bare majority of the court would annul. It is contended that a dissenting opinion often becomes the basis for a subsequent reversal and majority opinion. Moreover, a decision in an important case by a majority of one does not carry sufficient conviction as to its soundness to cause the people to accept it as final. The requirement of seven votes, rather than five, it is argued, would increase the confidence of the people in the court.

On the other hand, it is urged that the Supreme Court is a tribunal composed of men selected for their ability and distinction. With only nine members, it is not necessary to require a vote larger than a majority on questions of first importance as is the case in the more numerous legislative bodies. An opinion by a judge of the Supreme Court is very different from a vote on a bill, treaty, or confirmation of appointment. In 135 years of functioning under the Constitution, only nine acts of Congress have been held unconstitutional by five to four decisions. An examination of these cases discloses that the Congress has either attempted to invade the powers reserved to the states or people, or guaranteed to the individual, or to do something not authorized by the powers delegated to the Congress under the Constitution. The measure would give the minority practical control of decisions. It would increase the probability of Congress passing laws violating the Constitution. It would, in effect, bring about an admixture of legislative and judicial powers condemned by the Constitutional Convention, and would set up a legislative court. In support of this view, the following statement from the Constitution of Massachusetts is quoted:

¹This has been proposed by Senator Borah.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them—to the end that it may be a government of *laws* and not of *men*.

VII. The Significance of Unconstitutional Legislation.

Mr. William Marshall Bullitt, formerly Solicitor General of the United States, has made a searching analysis of legislation declared unconstitutional by the Supreme Court. Up to July 1, 1923, the Supreme Court had disposed of 29,310 cases. Seventy-three members had participated in 262 volumes of reports. There are approximately 44,893 acts of Congress and hundreds of thousands of acts of legislatures of the States. Within this period the Supreme Court has declared 48 acts or parts of acts of Congress void in 49 cases, and about 375 state laws void. Of the acts of Congress so invalidated, three occurred in the first 70 years of our history, and 46 in the next 60 years, of which 22 were in the last twenty years.

As to the nature of these acts and decisions, Mr. Bullitt makes the following classification:

- A. The Supreme Court's refusal to assume a jurisdiction which Congress attempted to confer upon it, but which was not authorized by the Constitution. There were twelve cases under this heading.
- B. Acts of Congress which encroached upon the purely internal and domestic affairs of the states. Here there were sixteen cases involving fourteen acts of Congress.

¹W. M. Bullitt, *The Supreme Court and Unconstitutional Legislation*, American Bar Association Journal, June, 1924, pp. 419-425.

- C. Acts of Congress which infringed the fundamental and personal constitutional rights of individual citizens. There are six cases under this heading.
- D. Acts of Congress that endeavored to do the very things which the Constitution positively prohibited Congress from doing. This includes seven cases.
- E. Recent cases in which Acts of Congress have been held void. There are six of these, involving among other statutes, the Corrupt Practices Act, the Future Trading Act, the Child Labor Laws, and the Minimum Wage Law.

The asserted dangers attending the right of judicial review of the Supreme Court seem to disappear after an examination of the very moderate use the court has made of this power. It has, in the main, refused to give opinions on political questions, and has scrupulously followed the decisions of the political departments on questions in their nature political. Moreover, the court has enforced the limitations of the Constitution. In a number of cases it has refused to exercise a power conferred by Congress because of its unconstitutionality. The Constitution has been its guide. It controls neither the army and navy, nor the finances of the nation, and derives such authority and respect as the people have conferred upon it under their constitution and laws. Its peculiar province is to interpret the laws and to maintain a balance between the departments and jurisdictions of the government established by the founders. The function of the court in this respect is admirably described by Chief Justice Taft (*Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 37):

It is the high duty and function of this Court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Con-

gress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self government on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

VIII. Shall We Change Our Form of Government?

It has been definitely proposed in certain quarters that the American system of government no longer functions properly, and that fundamental changes should be introduced in the Constitution which would in effect substitute a new form, with certain modifications, for our present system. This involves the relation of the executive and legislative departments. The theory of checks and balances, or the separation of powers was deliberately established as a principle of the American government in order to prevent unwarranted pretensions or usurpation of power by any one department of the government.

The *Presidential* system of government, which prevails in the United States, has an executive head elected by the people for a term of years, removable by impeachment, but politically irresponsible to the legislature; a cabinet appointed and dismissible by the president, and responsible to him; and a legislature elected by the people for a term of years and not dissoluble by the president. The *Parliamentary* system, which prevails in England and France, has for its organs of government a titular head of state, hereditary or elected for a term of years, who is not responsible to the legislature nor removable by it; a group of ministers selected and dismissible by the representative legislative body and responsible to it; and a legislature of one or two

chambers, chosen by the electorate for a term of years and liable to dissolution by the executive head.

It has become a commonplace to point out the delays, obstructions, and irresponsibility of the presidential system, and to give to the parliamentary system a position of superiority. It is true that the union of powers which is presumed to exist under the parliamentary system—a relation between the executive and the legislature so intimate as to amount to union—responsibility and responsiveness may be obtained to a far greater degree than under the American system. During the Great War, however, cabinet government broke down under the strain. The government of the United States, based upon a separation of powers with an independent and a politically irresponsible executive, only had to strengthen the hands of the executive by legislative enactment. The parliamentary governments were in time forced to scrap their parliamentary forms and to advert to the American principle of an executive who enjoyed a certain independence of the legislature. This was especially the case in England and France.

Following the war, the leading cabinet governments of Europe have taken certain strides in the direction of limiting the parliamentary domination which has so effectively interfered with the programs of prime ministers and cabinets. Ministerial crises, unstable and irresponsible parties, ministries having responsibility without authority—all these features of the parliamentary system have caused European statesmen to look with favor on the American system. Moreover, the new constitutions of Europe have adopted certain features of the presidential system. Party disorganization and legislative irresponsibility exist in most parliamentary governments. Under the presidential system one is assured of continuity of policy and stability of government.

The possible deadlock between the executive and the legislature under the Constitution is prevented by the extra-legal growth known as the political party. While acting separately and independently, there is cooperation and understanding between the departments as to the policies to be carried out and the laws to be enacted. Occasionally the executive and the legislative majority may represent different political parties. This does result in inaction and delay. Necessary measures are always enacted, however, and a policy of legislative inaction is not always an undesirable thing. In this country, while government is carried on through political parties, yet they are more in the background than in other countries. And to the people and the world it appears to be the government of the United States, rather than the government of a certain political party.

Dr. William Macdonald, in his recent book, "A New Constitution for a New America," has discussed the check and balance system as it obtains in the United States, and recommends its scrapping, together with the adoption of the essential features of the parliamentary scheme. While certain features of the American system are open to criticism, the American people will be slow to exchange an orderly system based on law and a logical separation of powers for a plan under which the executive and the courts must yield to the whims and caprices of a domineering parliamentary majority.

Opinions as to the wisdom of the principles of the separation of powers, and of its effectiveness under the American system vary. It is not unlikely, however, that the views of those who know something of its working through years of experience furnish a better guide than do the opinions of those who, from an academic standpoint give to prevailing European systems a position of supremacy.

It is modestly submitted that if a better system for the American government exists, the framers of the Constitution or the leaders in government during the century and a half of our country's growth would have found it. Mr. Champ Clark, veteran Congressman from Missouri, and former Speaker of the House, has made this interesting comment on the relation of the departments of government¹:

The Constitutional Convention was composed of the wisest men that ever met under one roof. The most sensible thing done by the Fathers of this Republic was the distribution of the powers of the Federal government into three departments; the legislative, the executive, and the judicial.

The fact that a bill must be passed by the House, and also by the Senate, before it is sent to the President for his signature, gives time for reflection, discussion, and analysis, not only by Representatives and Senators, but by the public, for in this age of electricity, nearly everybody betwixt the two seas knows of any event of considerable importance the same day, or not later than the morning after.

The next wisest thing was to divide Congress into two branches. Some lady asked George Washington at a great dinner what the Senate was created for, and why there were two legislative branches, instead of only one. He said that the Senate could perform the same function for legislation that a saucer did for tea; that they would pour the hot tea of the House into the saucer of the Senate to cool off.

Evidently, while George Washington was both a great soldier and a great statesman, he was not up to date in pink tea etiquette or he would not have said anything about pouring tea into a saucer. I have sometimes thought that, in these latter days, it is the hot Senate tea that needs cooling off quite as often as the House tea.

In a few matters the legislative and executive powers overlap and coalesce.

For instance, no bill becomes a law unless it is signed by the President, or unless it is passed over his veto by a majority of two-thirds of both the Senate and the House; or by the failure of the President to sign a bill within ten days (Sundays barred) after the bill is presented to him, while the Congress is in session, under which circumstances, it becomes a law.

¹Clark, *My Quarter Century of American Politics*, Vol. I, pp. 188-189.

No nomination for office, sent by the President to the Senate, becomes effective unless confirmed by it. The President negotiates treaties with foreign Powers, but they are of no avail unless ratified by the Senate.

In one instance, the legislative and judicial functions mingle. This is when the President is impeached by the House and is on trial in the Senate. The Chief Justice of the Supreme Court presides, for the manifest and sufficient reason that the Vice-President, who is to be the beneficiary of the conviction of the President, should not be permitted to preside.

Of course, in such case the Chief Justice cannot vote as to the guilt or innocence of the accused. He simply presides, passing on the admission of evidence, etc. As a matter of fact, the whole impeachment proceeding is quasi-judicial, the House sitting as a grand jury, and the Senate afterward sitting as a petit jury, though it is called the High Court of Impeachment.

However, many friends of the main principles of the American government and of efficiency in legislation and administration would welcome the adoption of measures, short of extended Constitutional revision, which would bring about better understanding and working relations between the executive and the legislative branches. The two propositions are not altogether incompatible. Clearly, such measures must be in keeping with Constitutional arrangements. The essential feature of parliamentary government is forbidden the American government unless we are prepared for drastic constitutional change, for the Constitution provides that "no Person holding any Office under the United States shall be a Member of either House during his continuance in Office." In other words, high executive positions cannot be held by the responsible leaders in the Congress.

The most advanced steps in this direction were taken by President Woodrow Wilson. In 1885, Mr. Wilson published his first book, "Congressional Government." It was a searching inquiry into the American constitutional system, and into our legislative and administrative machinery.

The striking contrast in modern politics, he declared, was between congressional and parliamentary governments. He declared: "Congressional government is committee government; Parliamentary government is government by a responsible cabinet ministry. These are the two principal types which present themselves for the instruction of the modern student of the practical in politics; administration by semi-independent executive agents who obey the dictation of a legislature to which they are not responsible, and administration by executive agents who are the accredited leaders and accountable servants of a legislature virtually supreme in all things."¹ The Congress is thus given a position of primacy in government. To remedy the defects pointed out by Mr. Wilson would require strengthening the position of the legislature by making the executive responsible to it, and removable at its will.

Today, however, the striking contrast in politics is not between congressional and parliamentary governments, as Mr. Wilson then correctly declared, but between presidential and parliamentary governments. In the United States, the Congress has been forced to yield to the President in public esteem. Moreover, there has been a growth of executive power at the expense of the legislature in governments generally. This is due in part to the increased administrative services of the state, which from their nature, must be performed by the executive departments. In this country, no one is more responsible for the change than Mr. Wilson himself, who, together with Mr. Roosevelt, revived the Jacksonian conception of the Presidency. To Mr. Roosevelt, the Presidency was limited only by what was expressly prohibited by the Constitution and laws. He was not satisfied with the exercise of merely positive

¹*Congressional Government*, p. vi.

grants of power. Under his interpretation of the Presidency he could do anything not forbidden by the Constitution and laws, whether specifically authorized or not. Early in his administration, Mr. Wilson revived the custom of delivering messages to the Congress in person. Moreover, he declared that he was not only the head of the government, due to the generous suffrages of the American people, but he was also the leader of the Democratic and the then dominant party, as a result of its deliberate choice. He assumed the leadership, both in legislation and administration, which resulted in a functioning of the executive and legislative departments seldom attained even by parliamentary governments. Mr. Bryan, then Secretary of State, appeared at certain hearings on treaties conducted by the Committee on Foreign Relations of the Senate, with the thought that he might, through his knowledge of negotiations, facilitate ratification. That the Senate resented this as an executive interference does not establish its inadvisability. Mr. Newton D. Baker was summoned to appear before a congressional committee to explain why more progress had not been made in prosecuting the war. The incident had its political significance, but Mr. Baker, having the facts in his possession, turned the occasion from that of interpellation to one of justification and explanation of the course of the administration.

It is to be observed that Mr. Wilson brought about a more intimate relation between the executive and legislative departments—not by making the executive responsible to and dismissible by the legislature—but by strengthening the power and the independence of the executive. The President, receiving a popular mandate from the people, possessing a definite tenure and an amplitude of powers, and unhampered by counsel of coordinate or superior authority, is in a stronger position than the Congress to

determine policy. The Presidency has become a great democratic force in the country. He can, by carefully and wisely utilizing his powers as head of the state and leader of his party, cope with almost any situation. His efficiency varies as does the strength of and his control of his party. The greatest dangers to the American government flow—not from the comparatively few instances where the President and the Congress represented different party allegiances—but from the condition where both departments, under the control of a single party, fail to get together. This is a fault common to presidential and parliamentary governments alike. It goes rather to the efficiency of the party system than to the nature of the government. There will always be conflicts between the legislative and executive departments, and giving the control of the executive to the legislature has not served to avoid them. Nowhere have legislatures distinguished themselves for the happy and cooperative relations between the upper and lower branches. Each house, seeking to maintain its own integrity, desires to dominate the other. This deep-seated desire for power, so evident in the relations of the two houses with each other, would characterize the legislature as a whole if it could dominate the executive. Moreover, the one positive, unifying force in the government would be destroyed.

Mr. Chester H. Rowell, a distinguished California publicist, has made some rather caustic criticisms of the American system of governments, state and federal. He has described our federal and state governments as “irresponsible,” and he regards this as “one of its imperfections.” Our “elections by calendar” are given special attention. Canadian elections, he observed, are precipitated by an issue, and American elections by the calendar. “And that,” he declared, “makes all the difference between elections that

are about something, and elections that are about nothing ; between real parties and pretended parties ; between responsible and irresponsible government. In the campaign orator's favorite climax, 'When the sun goes down on the evening of the first Tuesday after the first Monday of next November, the American people will have decided'—well, they may have decided that the sun shall rise the following morning on Wednesday. Ordinarily, not much else has been submitted to them. The election is called by the calendar, and little is involved in it except the calendar."¹ As evidence of irresponsibility, he cites the reciprocity issue under Taft, the Spanish War and the Philippine question under McKinley, and the issue of peace and war under Wilson. It should be noted that Canadian opposition to the reciprocity agreement did not spring from President Taft's advocacy of it, but from the unguarded statement of a leader in legislation (Mr. Champ Clark) that the United States would eventually annex Canada. Moreover, the reciprocity issue furnishes an excellent example of cooperation between a Republican President, who negotiated the treaty, and friendly Democratic Senators, who in the main effected its ratification.² It illustrates, also, how a parliamentary minority, ever seeking to regain power, can turn a simple and relatively unimportant foreign issue into one which, the minority claims, threatens the integrity of the country. In the United States, reciprocity was the issue, and it was settled on that basis. In Canada, the issue became the integrity of the Dominion. That an administration may turn its interest from domestic to foreign questions because of an international war, and that issues arise which did not exist at the time the government was constituted, does not establish that as a general rule there

¹University of California Chronicle, July 1920, p. 222.

²It is a commonplace that President Taft's chief opposition came from within the ranks of his own party.

should be a popular referendum on such questions. Peace is the normal, and war the abnormal condition of mankind and of nations. Indeed, the European states having parliamentary governments entered the greatest of wars under governments entrusted with power because of issues unconnected with the questions of peace and war. The government in power was given its opportunity, and stood or fell upon the fact of whether or not it was successfully prosecuting the war. When changes were made, they were in the direction of dropping certain cumbersome parliamentary arrangements for effective presidential features, rather than giving continued effect to the principle of ministerial responsibility. The government of England, under Lloyd George, furnishes abundant evidence for these statements.

While the "defects" of the American system indicated by Mr. Rowell deserve serious thought, they cannot be remedied without basic alterations in our constitutional system. We have already seen that the central feature of the parliamentary system—executive membership in the legislature—is forbidden under the Constitution. To remedy them would be to forego certain advantages which Mr. Rowell has seemingly not discussed. The functioning of the American government during war under its ordinary powers is unparalleled in history. What was accomplished in parliamentary governments by deep-seated changes was done here through ordinary legislation. Under a parliamentary system, the independence of the executive would be lost. The advantages of this principle are obvious to the American people, who now, more than ever, look to the President for leadership. Finally, under a different system, we would have an executive chosen by the legislature rather than one chosen by the people. It is, in effect, responsibility to the people through a great national

political party rather than responsibility to the legislature through the party majority in the lower house.

Certain measures, therefore, designed to bring the executive and the legislature closer together, may well be taken, which are within constitutional limitations. In a later article, Mr. Rowell has taken a more optimistic view of the situation, and has proposed a certain kind of responsibility for Cabinet officers without decreeing their resignation.¹ A real responsibility would result, he has declared, "if they were responsible to the President and to each other for presenting a common policy openly, before Congress and in the sight of the people, by argument rather than by lobbying, and take the consequences of their own prestige of their successes and failures." This is no new proposal. Mr. Taft recommended, while President, that members of the Cabinet be given the right to appear in Congress, answer questions, and defend their policies. It has also been suggested that the President should choose his cabinet from men who have had long and wide legislative experience. The position of Mr. Charles E. Hughes certainly a champion of the Constitution and of the American form of government, is disclosed by the following statement:

There is, however, the possibility of improvement without weakening our safeguards, by improving the methods of contact between the executive and the Congress. It ought to be possible for Cabinet officers to take part in the debates in both houses on matters touching their departments and thus to be able to give exact information and to defend themselves against unjust attacks. A vast amount of time is now wasted in the Congress over the things that are not and never were. An ounce of fact is worth many pounds of talk. Under the present arrangements, a Cabinet officer often hears of misunderstandings and of an outpouring of mistaken notions, which a brief statement from him

¹*The World's Work*, December 1924, pp. 155-163, and articles by Mr. Rowell appearing in later issues.

could have corrected, but the misapprehension has been voiced and has gone through the country, perhaps never to be overtaken. Mr. Justice Story in his "Commentaries on the Constitution" says on this point:

"The heads of the departments are, in fact, thus precluded from proposing or vindicating their own measures in the face of the nation in the course of debate, and are compelled to submit them to other men, who are either imperfectly acquainted with the measures or are indifferent to their success or failure. Thus that open and public responsibility for measures which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to secret and unseen influences, to private interviews and private arrangements to accomplish his own appropriate purposes, instead of proposing and sustaining his own duties and measures by a bold and manly appeal to the nation in the face of its representatives."

We can preserve the advantages of stability and enhance the opportunities of executive leadership, not by overriding the cherished prerogatives of the Congress, or by attempting to gain an illicit advantage for that leadership, but by having a recognized contact through the regular admission of Cabinet officers to the floor of both houses of the Congress. This would not require any voting power on their part or any change in the Constitution, but simply a change in procedure which could readily be effected by each house. I commend to your attention the report to the Senate on this subject which was made in 1881 by a committee of which Senator Pendleton was Chairman, and Senators W. B. Allison, D. W. Voorhees, James B. Blaine, and John J. Ingalls, with others, were members. They said:

"The power of both houses of Congress, either separately or jointly, to admit persons not members to their floors, with the privilege of addressing them, cannot be questioned. . . . The provision of the Constitution that 'no person holding any Office under the United States shall be a Member of either House during his continuance in Office' is in no wise violated. The head of a department, reporting in person and orally, or participating in debate, becomes no more a member of either House than does the chaplain, or the contestant or his counsel, or the Delegate. He has no official term; he is neither elected nor appointed to either house; he has no participation in the power of impeachment, either in the institution or trial; he has no privilege from arrest; he has no power to vote.

"We are dealing with no new question. In the earlier history of the government the communications were made by the President to Congress orally, and in the presence of both or either of the houses. Instances are not wanting—nay, they are numerous—where the President of the United States, accompanied by one or more of his Cabinet, attended the sessions of the Senate and House of Representatives in their separate sessions and laid before them papers which had been required and information which had been asked for.

"Your committee is not unmindful of the maxim that in a constitutional government the great powers are divided into legislature, executive, and judicial, and that they should be conferred upon distinct departments. These departments should be defined and maintained, and it is a sufficiently accurate expression to say that they should be independent of each other. But this independence in no just or practical sense means an entire separation, either in their organization or their functions—isolation, either in the scope or the exercise of their powers. Such independence or isolation would produce either conflict or paralysis, either inevitable collision or inaction, and either the one or the other would be in derogation of the efficiency of the government. . . .

"It has been objected that the effect of this introduction of the heads of departments upon the floor would be largely to increase the influence of the executive on legislation. Your committee does not share this apprehension. The information given to Congress would doubtless be more pertinent and exact; the recommendations would, perhaps, be presented with greater effect, but on the other hand, the members of Congress would also be put on the alert to see that the influence is in proportion only to the value of the information and the suggestions; and the public would be enabled to determine whether the influence is exerted by prevision or by argument. . . .

"This system will require the selection of the strongest men to be heads of departments, and will require them to be well equipped with the knowledge of their offices. It will also require the strongest men to be leaders of Congress and participate in debate. It will bring these strong men in contact, perhaps into conflict, to advance the public weal, and thus stimulate their abilities and their efforts, and will thus assuredly result to the good of the country."

This desirable change could be made at any time under appropriate rules which would promote the convenience both of Cabinet officers and the houses of Congress. It could be required that questions to be addressed to the members of the

Cabinet should be filed a certain length of time before the appearance of the officer and, except when matters relating to his department were under discussion, his attendance would be excused. It would not be difficult to arrange the mechanism of such contact if its importance were recognized.

IX. What is the Constitution of the United States?

It is clear that the word "Constitution" cannot be limited to the provisions of the written document. According to Professor Dicey, the great British authority on constitutional law, this subject includes the fundamental rules which directly and indirectly affect the distribution and exercise of sovereign power. One might justly conclude, then, that there are two constitutions: the *Written Constitution*, as it came from the hands of the framers and has been added to by amendment, which may be called the *Formal Constitution*; and the *Unwritten Constitution*, based upon political usage and built up out of judicial decisions. The growth of parties and the increased power and prestige of the Presidential office are evidences of it. This may be described as the *Vital Constitution*.

Some writers contend that the Constitution is not what it seems. Due to what he calls the "custom of the Constitution," Professor Charles A. Beard has indicated the following ways "in which party practices transform the written law"¹:

1. The Constitution states that the President is elected by electors chosen as the legislatures of the states see fit. In fact, candidates are chosen at national party conventions; electors are figureheads selected by the parties and bound to obey party commands; and the voters have the right to choose from the candidates nominated. Even the Cabinet is a body unknown to the Constitution.

¹Beard, *American Government and Politics* (4th ed.), p. 97.

2. The Constitution declares that Senators are elected by the "people" of the states. To understand how they are elected, one must examine the direct nomination laws and party practices of the different states.

3. The Constitution says that the Speaker is chosen by the House of Representatives, when he is really chosen by a caucus of the majority members of the House.

4. Under the Constitution, the Speaker is presumed to be an impartial presiding officer, but in practice he is one of the leaders of the majority party of the house.

5. The Constitution stipulates that revenue bills must originate in the House of Representatives. In practice, the Senate may be said to have coordinate authority in revenue bills.

6. The Constitution says very little about legislative procedure. The spirit and operation of Congress depend upon the rules, organization of committees, and agreements among the leaders of the majority party.

It is further contended that the Constitution is what the judges make it. Some hold that it is their (the judges') purpose to give effect to the desires of the people. Others regard them as virtual machines, holding their positions to pronounce upon questions which come before them according to some fixed and infallible standard. This proves that the function of the judiciary, especially in its relation to the Constitution, should be made clear to the people. It cannot be denied that the opinion of the judiciary as to its own function has much to do with Constitutional interpretation and application. The common law has been taken as a guide, but it must constantly be supplemented by statute and by equitable remedies. The law of nature has been

quoted, but is less precise and definite than the common law in its modern application. The *Federalist* has been taken as a guide, but its theory of government was strongly resisted by the Jeffersonian democracy, and by the Supreme Court itself after the death of John Marshall. Webster's Dictionary and Hutchinson's History of Massachusetts have been used in decisions as aids to interpretation. The courts have also referred to the sense in which a term was used in the first Congress as a guide to interpretation. Acts of Congress have been given weight in discovering the meaning of the Constitution. The debates in the Constitutional Convention and the actual intent of the framers have formed the basis of many constitutional interpretations. While some guides to its meaning have been used more than others, no one guide has been used to the exclusion of others. The Courts, therefore, have used what in their opinion were the most reliable means of expounding the Constitution. Nothing more can be asked. According to Chief Justice Marshall in the case of *Marbury v. Madison* (1 Cranch, 137), "It is emphatically the province and the duty of the judicial department to say what the law is." Moreover, it is important to distinguish between the effect which is given to the provisions of the Constitutions by the courts, and the aids or guides which are used to reach a decision. With respect to the Constitution as a guide for the Courts, the Chief Justice said:

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why, otherwise, does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion

on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Certain theories of government and law have been held to dictate the interpretation and effect of the Constitution. Such phrases as "the theory of our government," "the essential nature of all free governments," and "the spirit of the Constitution" illustrate the hold which such theories as they connote have on judges and constitutional writers. An "economic theory" of the Constitution has been advanced by Professor Beard, and fully discussed in his book, "The Economic Interpretation of the Constitution." Under the Sherman Anti-trust Act, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade among the several states or with foreign nations, was declared illegal. In interpreting the Sherman Act, the Court, after ordering the dissolution of the American Tobacco Company and the Standard Oil Company in 1911, declared that the mere existence of a combination did not make it illegal under the Sherman law; that the dissolution of a company would not be ordered merely because it restrained trade; and that dissolutions would be ordered only in case of "unreasonable" restraint of trade. The phrase "rule of reason" was coined by Chief Justice White in the Standard Oil case, and as a theory of law was used to limit the power of Congress to prohibit interstate commerce to constitutional limitations which were judicially

enforceable. An examination of the cases decided by the Supreme Court under Marshall and Taney will prove that theories of government and law, entertained by a majority of the Court under the leadership of the actual and titular heads of the Court, have had great weight in the effect given to constitutional provisions. What weight should be given to previous opinions of courts? To what extent should theories of government prevail? Succeeding courts have often reversed the position of previous ones on great Constitutional questions. Moreover, mere theories must in time give way to what is constitutionally possible. The Constitution was not designed to give effect to one or several theories. Its purpose was to make the cooperative life of the nation easier, more efficient and more effective. It must, in effect, be a reconciliation of the economic, social, and political interests of the people who made it and who live under it. On this point, Judge Holmes, in his dissenting opinion in the case of *Lochner v. New York* (198 U. S. 45) significantly stated:

But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

It is idle to contend that the Constitution is a static thing. It is dynamic, and the means is provided for expansion or contraction as the public need requires. "To erect a state, to institute the form of its government, is a function inherent in the sovereign people." The power to make implies the power to change, within the limits and through the machinery determined upon by the power to make. The Courts have agreed that the Constitution may

be changed in any way with the exception of the provisos appearing in the instrument. It would be strange, indeed, if the people—living for almost a century and a half under a written instrument, did not amend it. It would be strange if they did not, as the years pass, give effect to some of its provisions through extra-constitutional means not intended by the framers. The Constitution is by no means a definite thing. On this point Judge Cooley has truthfully declared:

We may think that we have the Constitution all before us; but for practical purposes, the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else is. . . . Cervantes says: "Every one is the son of his own works." This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it.

However, amendments to the Constitution, and what has been called the "custom of the Constitution," do not operate to upset the fundamental principles of the Constitution, or to dictate the writing of a new instrument based upon an entirely different set of principles. Just as certain extra-constitutional practices have become established through custom, so have the first principles and the main features of the written constitution found a definite and lasting place in our national life. Most of the writers who suggest radical changes, magnify the few practices which vary from the original Constitutional design and minify the importance of the many Constitutional provisions which are definitely woven into our national fabric. It should be remembered that a few concrete cases do not suffice to establish a general principle of widespread application. Professor Beard, easily the first of the scholars who stress "the changing spirit of the Constitution," or look upon

the instrument as essentially "a changing organism," has answered this view himself by laying down the following "general principles of the federal system";

1. The doctrine of limited government.
2. The doctrine of delegated powers and the supremacy of federal law.
3. The protection of private rights.
4. The separation of powers.
5. The doctrine of judicial supremacy.
6. The regulation of relations between states.
7. The definition and guarantee of such political rights as citizenship and suffrage.

These general principles, so ably framed by Professor Beard, while subject to modification by constitutional interpretation and political practice, have in the main remained as they were conceived at the time of the "Founding Fathers." No substantial effort has been made to change them by amendment. They have been strengthened through the passing of time. They have found expression in the written provisions of the Constitution, and are exemplified in the practice of the national and state governments, and in the civic behavior of our citizens. To eradicate them would be to destroy the instrument which gave them birth. They must prevail if the Constitution is to endure.

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NOTE ON A GENERAL READING LIST

In addition to the reading lists appended to each section, it is important that the student should keep in mind the onward sweep of Constitutional formation and development.

For Part I, the Formation of the American Constitutional System, the student cannot be too familiar with Farrand's three volumes on *The Records of the Constitution*. *The Federalist* should be carefully read by every student of the Constitution. Other important works are: Bancroft, *History of the Constitution*, 2 vols.; Fiske, *The Critical Period*; Farrand, *The Framing of the Constitution*; and Beard, *The Supreme Court and the Constitution*, and *The Economic Interpretation of the Constitution*.

For Part II, the Development of the American Constitutional System, the student should read the important cases cited in the text, including the following: *Marbury v. Madison*; *Dartmouth College v. Woodward*; *McCulloch v. Maryland*; *Ableman v. Booth*; *Charles River v. Warren Bridge*, *ex parte Merryman*; *Munn v. Illinois*; *Smyth v. Ames*, and *Pollock v. Farmers Loan and Trust Company*. For political and legal development, the following books are important: Burgess, *The Middle Period*; Dunning, *Essays in Civil War and Reconstruction*; and Haines, *The American Doctrine of Judicial Supremacy*.

The Supreme Court and the Constitution are dealt with in two recent exhaustive works: Warren, *The Supreme Court in United States History*, 3 vols.; and Beveridge, *The Life of John Marshall*, 4 vols.

Cases on Constitutional Law have been compiled by Thayer, Hall, and Evans.

Evolutionary discussions of the Constitution include Norton, *The Constitution of the United States, its Sources and its Application*; Beck, *The Constitution of the United States*; Bur-

dick, *The Law of the American Constitution*; Willoughby, *The American Constitutional System*. For an emphasis on men and ideas rather than mere facts and events, see Elliott, E. G., *Biographical Story of the Constitution*.

Two excellent volumes of a general character on the American government are: Munro, *Government of the United States* (1925), and Beard, *American Government and Politics* (1924).

The decisions of the Supreme Court of the United States are compiled in *The United States Reports*.

For exhaustive citations to the cases of the Supreme Court of the United States construing the several provisions of the Constitution collated under each provision, see *The Constitution of the United States of America as Amended to January 1, 1923* (Annotated), compiled by George Gordon Payne, under the direction of the Committee on Rules of the United States Senate.

For general rules of construction and interpretation of the Constitution of the United States, the student should consult the following leading general cases:

Nature of the Constitution:

- McCulloch v. Maryland, 4 Wheat. 316.
- Barron v. Baltimore, 7 Pet. 243.
- Twining v. New Jersey, 211 U. S. 78.
- Slaughterhouse Cases, 16 Wall. 36.
- U. S. v. Cruikshank, 92 U. S. 542.
- Civil Rights Cases, 109 U. S. 3.

The Jurisdiction of the United States:

- Gibbons v. Ogden, 9 Wheat. 1.
- McCulloch v. Maryland, 4 Wheat. 316.
- Cohens v. Virginia, 6 Wheat. 264.
- Texas v. White, 7 Wall. 700.
- U. S. v. Texas, 143 U. S. 621.
- Tennessee v. Davis, 100 U. S. 527.

Logan v. U. S., 144 U. S. 263.
American Insurance Co. v. Canter, 1 Pet. 511.
Mormon Church v. U. S., 136 U. S. 1.
Jones v. U. S., 137 U. S. 202.
In re Ross, 140 U. S. 453.
Fong Yue Ting v. U. S., 149 U. S. 698.

Relation of the States to the Federal Government:

Lane County v. Oregon, 7 Wall. 71.
Martin v. Hunter, 1 Wheat. 304.
Tennessee v. Davis, 100 U. S. 257.
Ex parte Siebold, 100 U. S. 371.
In re Neagle, 135 U. S. 1.
Davis v. Elmira Savings Bank, 161 U. S. 275.
Collector v. Day, 11 Wall. 124.
Worcester v. Georgia, 6 Pet. 570.
Chinese Exclusion Case, 130 U. S. 604.

Checks and Balances in Government:

Marbury v. Madison, 1 Cranch 137.
Chicago, &c., R. Co. v. Wellman, 143 U. S. 339.
Pollock v. Farmers Loan & Trust Co., 158 U. S. 601.
Field v. Clark, 143 U. S. 649.

APPENDIX

PART I

*A PROPOSED SYLLABUS FOR A COURSE ON AMERICAN INSTITUTIONS AND IDEALS*¹

I

HISTORICAL BACKGROUND

1. Colonial Origins.
2. Colonial Struggles Against Arbitrary Power.
3. Independence.
4. Confederation.
5. The Constitution.

II

AMERICAN IDEALS AS FOUND IN AMERICAN POLITICAL PHILOSOPHY

I. The American Ideal of Imperial Organization:

- A.* The Empire not one body politic—one commonwealth governed from England.
- B.* Not one of imperial federal union.
- C.* Rather a league of self-governing nations united through the Crown—an "imperial partnership"—"Autonomous nations of an imperial Commonwealth"—the Irish Free-State is bringing the American ideal close to realization.

II. The American Ideal of Independence:

- A.* Early hope for some form of imperial organization.
- B.* Growth of parliamentary supremacy rendered futile such hope.
- C.* Independence as a last resort.
- D.* A movement at once constitutional, political, social and economic.

¹Prepared by the author in collaboration with Dr. William H. George of the University of Washington.

III. The American Ideal of Rights:

- A. Rights derived from nature and reason, common law, the British Constitution, charters and acts of Parliament.
- B. Kinds of rights:
 - 1. Natural rights of man as men—life, liberty and property.
 - 2. Rights of Christians—freedom of worship.
 - 3. Rights of free British subjects—life, liberty, property, no taxation without representation, legislative power, freedom from arbitrary government. See Samuel Adams' "Rights of the Colonists."
- C. Underlying concept that of Individualism.

IV. The American Ideal of Liberty:

- A. A sphere of immunity from arbitrary power.
- B. Kinds of liberty—political and civil; liberty of commerce; religious liberty.
- C. Bulwarks of liberty.
 - 1. Popular Sovereignty.
 - 2. Defined and limited powers of government.
 - 3. Written Constitution.
 - 4. The Constitution as supreme law.
 - 5. Independent judiciary.

V. The American Ideal of Property:

- A. One of the natural rights.
- B. Widely defined as whatever has value attached to it, e.g., expression of opinion, safety and liberty of persons, use of faculties, etc.
- C. Narrowly defined as the possession, use and disposal of some valuable object, such as land, merchandise, money.
- D. Protection of property, in the wide acceptance of the term, is the end of government. "Government is instituted to protect property of every sort."—James Madison.
- E. Property is "not to be disposed of by them who have it not."—John Adams.
- F. "Taxation without representation is tyranny."

VI. The American Ideal of Equality:

- A. No equality of goods nor of conditions.
 - B. Equality of rights, of opportunities.
 - C. Equality a juristic ideal.
- -

VII. The American Ideal of Government:

- A. Founded on compact—government by consent of the governed.
- B. Exists to protect natural, inalienable, indefeasible and inviolable rights.
- C. Powers enumerated, defined and limited for the purpose of protecting rights.

VIII. The American Ideal of Representation:

- A. A right founded on the "eternal law of equity."
- B. One of the rights of free British subjects.
- C. Property not to be taken in the form of taxes except by vote of representatives.
- D. "Virtual" or "constructive" representation as opposed to actual representation.

IX. The American Ideal of Fundamental Law:

- A. A written constitution wherein are enumerated, defined and limited the powers of government.
- B. The constitution fundamental and paramount.
- C. Statutes repugnant to fundamental law are void.
- D. Development of judicial review.

X. The American Ideal of Popular Sovereignty:

- A. The supreme and original will of the people the source of political authority.
- B. The *state* founded immediately upon that will.
- C. The *government* only an agent of the state for executing the will of the people.
- D. Recent devices for making effective popular sovereignty.

XI. The American Ideal of Limitations on Power:

- A. Enumerated and defined powers.
- B. Written constitution.
- C. Separation of powers.
- D. Checks and balances.
- E. Judicial review.

Note: "That this shall be a government of laws and not of men."

XII. The American Ideal of Judicial Supremacy:

- A. Opposed to legislative supremacy.

- B. Chronologically preceded legislative supremacy in England.
- C. Related to the American concept of fundamental law.
- D. Recent movements toward legislative supremacy.

XIII. The American Ideal of Federalism:

- A. Colonists' theory of British Imperial Organization not federalism.
- B. A political device for extending the area of representative democracy, while satisfying the instinct for local self-government.
- C. Tested in the Confederation, and in the Civil War.
- D. Extension of Federal power.

XIV. The American Ideal of Democracy or Government by the Numerical Majority:

- A. Early enthusiasm for democracy.
- B. Tyranny of majorities in early state governments.
- C. Reaction as expressed in the Constitution.
- D. Effect of Amendments to the Constitution.
- E. Recent devices for making effective democracy, the initiative, referendum, and recall.

XV. The American Ideal of a Federal Republic:

- A. Not government by numerical majority solely.
- B. A government of laws and not of men.
- C. Checks and balances to prevent the volatile will of the people from being enacted into laws.
- D. A conservative ideal, differing from dictatorship, on the one hand, and from direct democracy, on the other. A government of reason, of law, of justice.

III

AMERICAN IDEALS AS INSTITUTIONALIZED IN FUNDAMENTAL LAW.

There are two Constitutions of the United States:

The Written Constitution, as it came from the hands of the framers and has been added to by amendment. This may be described as the *Formal Constitution*.

The Unwritten Constitution, based upon political usage and built up out of judicial decisions. The growth of parties and the increased power and prestige of the Presidential office are evidences of it. This may be described as the *Vital Constitution*.

These two Constitutions, taken together, embody three fundamental ideals of government which serve as the groundwork upon which all other American ideals are built:

The ideal of a Federal Republic.

The ideal of national power adequate to national needs.

The ideal of limitation of governmental power for the protection of the rights of states and of individuals.

III-A

THE WRITTEN CONSTITUTION AS IT EMBODIES THE IDEALS OF FEDERALISM, NATIONAL POWER AND THE LIMITATION OF POWER.

I. Federalism:

A. Federalism vs. Nationalism.

A federal government is one in which the central authority terminates on corporate entities (states), and in which representation is corporate.

A national government is one in which the central authority terminates on the individuals of the nation, and in which representation is based upon population.

B. "Federalism" used as a slogan to gain votes for a Constitution which set up a government in many respects "national."

C. In what respects the American Government is federal:

1. The act of establishing the government a federal act. (Madison's interpretation.)
2. The Senate represents the federal principle of equality of states.
3. It is federal in the residuary powers left to the states.
4. Partly federal in the amending process.
5. Federal in that new states cannot be carved out of old ones nor old states joined together without the consent of the states affected.

D. In what respects the American Government is national:

1. The act of establishing the government was a national act. (Webster's interpretation.)
2. Representation in the House is based upon population.
3. Operation of the federal government—reaching to individuals—is national.
4. Partly national in the amending process.
5. National in its guarantee of republican government in the states.
6. National in that the Constitution is the supreme law of the land.

Note: On this topic of federal vs. national, see *Federalist* No. XXXIX.

E. The effect of amendments on federalism and nationalism:

1. The Tenth Amendment, in making explicit the doctrine of the reserved powers of the states, gave formal recognition to the federal principle, and to that extent strengthened it.
2. The Eleventh Amendment, embodying the principle of the non-suability of a state, strengthened federalism by recognizing more explicitly the sovereignty of the states.
3. The Thirteenth, Fourteenth and Fifteenth Amendments went far toward establishing national government by abolishing slavery, which had been considered a local or at least a sectional institution, and by creating a national citizenship with rights held to be inviolable.
4. The Sixteenth Amendment frees the federal power of taxation as regards incomes.
5. The Eighteenth Amendment enlarges the bounds of the federal police power.
6. The Nineteenth Amendment simply adds the word "sex" to the Fifteenth Amendment.

Thus the pendulum of constitutional amendment first swung toward federalism, but the issue of secession and the appeal to arms caused it to swing back toward nationalism.

II. Powers of the National Government:

A. Intended to be commensurate with national needs:

1. To form a more perfect union.

2. To establish justice.
3. To insure domestic tranquillity.
4. To provide for the common defense.
5. To promote the general welfare.
6. To secure the blessings of liberty, etc.

B. Powers of Congress:

1. Security against foreign danger :
 - a.* Declaring war and granting letters of marque.
 - b.* Maintaining army and navy.
 - c.* Raising a militia.
 - d.* Levying and borrowing money.
2. Regulation of intercourse with foreign nations :
 - a.* Making treaties.
 - b.* Sending and receiving ambassadors, public ministers and consuls.
 - c.* Defining and punishing piracies and felonies committed on the high seas, and offenses against the law of nations.
 - d.* Regulating foreign commerce.
3. Maintenance of harmony and proper intercourse among the states :
 - a.* Regulating commerce among the several states and with the Indian tribes.
 - b.* Coining money and regulating the value thereof.
 - c.* Punishment for counterfeiting.
 - d.* Fixing the standard of weights and measures.
 - e.* Establishing uniform rule of naturalization and laws of bankruptcy.
 - f.* Providing for the validity of the acts and records of one state in another.
 - g.* Establishing post roads and post offices.
4. Certain miscellaneous objects of general utility :
 - a.* Patent and copyright.
 - b.* Exclusive jurisdiction over the Federal District.
 - c.* Punish treason but no bill of attainder.
 - d.* Admit new states into the Union.

- e.* To govern territories.
 - f.* Guarantee to every state of a republican form of government.
 - g.* Assumption of the debts of the Confederation.
 - h.* Providing for amendments.
 - i.* Providing for the establishment of the Constitution.
- 5. Restrictions on the authority of the several states:
 - a.* No state to enter into any treaty, alliance or confederation; grant letters of marque and reprisal, etc.
 - b.* No state, without the consent of Congress, to lay any imposts or duties on imports or exports, etc.
 - 6. Powers for giving due efficacy to all the rest:
 - a.* To make laws necessary and proper, etc.
 - b.* Constitution is supreme law.
 - c.* All legislative, executive and judicial officers, federal and state, bound by the Constitution, and must take oath to support it.

Note: This analysis of the powers of Congress is taken from the *Federalist*, Nos. XLI-XLIV.

C. Powers of the President:

- 1. Executive powers proper, including a certain policy-forming power.
- 2. Legislative powers.
- 3. Administrative powers.
- 4. Military powers.
- 5. Judicial powers.
- 6. Diplomatic powers.

D. Powers of the Judiciary:

- 1. Thought by Hamilton to be the weakest of the three Departments, because it had neither will nor force, but merely judgment.
- 2. Power to declare acts repugnant to the Constitution void. (Conceded by Hamilton.)
- 3. Power of judicial review, it was not thought, would constitute the courts superior to the other organs of government.

E. The effect of amendments on the powers of the National Government:

1. Early amendments made plain that the powers of the Federal Government were delegated and enumerated, and that the remaining powers were reserved to the states or to the people respectively.
2. Later amendments enlarged the bounds of federal power.

III. Constitutional Limitations on Power:

A. The Constitution described by the framers as "limited."

B. Exceptions to legislative authority:

1. No bill of attainder.
2. No *ex-post facto* laws.
3. Suspension of writ of habeas corpus only in emergencies.
4. No duty on exports.
5. Other prohibitions, both federal and state.

C. Delegated, not inherent, powers.

D. Express enumeration of powers.

E. Constitution the supreme law of the land.

F. Exercise of power must conform to fundamental law.

G. Courts to decide when statutes are repugnant to the Constitution.

H. Separation of powers, and distribution of powers between federal and state organs of government.

I. Checks and balances of one department upon the others.

J. With these constitutional devices it was thought that a bill of rights was unnecessary.

K. Effect of amendments on the limitation of powers:

1. First eight amendments constitute a bill of rights protecting the rights of individuals against national power.
2. The Ninth and Tenth Amendments protect the rights of the people collectively and of the states.
3. Later amendments lay restrictions on the power of the states in the interest of individual liberty and what has proved to be the liberty of corporations.

III-B

THE UNWRITTEN CONSTITUTION AS AN EXPRESSION OF
THE IDEALS OF FEDERALISM, NATIONAL POWER
AND THE LIMITATION OF POWER**I. Federalism:**

- A. The decisions of John Marshall went far toward establishing a national government.
- B. The Civil War destroyed the idea of compact and the right of secession.
- C. Interpretation of the Supreme Court in the Slaughter House Cases, etc., left the administration of civil rights in the care of the states.
- D. Refusal of states to concur in the enforcement of the Volstead Act indicates a federal tendency.

II. National Powers:

- A. The doctrines of "implied powers," and of powers "necessary and proper," have enlarged the area of the legislative competence of the Federal Government.
- B. The development of the "police power" has further enlarged the field of Federal legislation.
- C. Powers of the President have been augmented by strong personalities, and the people have acquiesced.
- D. Federal system of grant in aid to the states is extending federal control.

III. Limitations on Power:

- A. The rise of parties has offset in some degree the effectiveness of our separation of powers.
- B. Interpretations of the Supreme Court on points involving "due process of law," "equal protection of the laws," "obligation of contract" have favored the protection of individuals and corporate rights against legislative majorities.
- C. As a result there is a conflict between the developing police power and protection of rights.
- D. Demand that the power of the courts to declare legislation unconstitutional shall be curbed.

- E. At bottom this is a conflict between two systems of government, one the English system of parliamentary supremacy and the other, the American system of separation of powers, checks and balances, judicial review, etc. Parliamentary supremacy arose in modern times about 1642, in opposition to the divine right of kings. The older English system resembled more judicial supremacy in that courts claimed the right to declare void acts of Parliament contrary to natural reason and justice. It was the doctrine of parliamentary supremacy that occasioned the American Revolution. That doctrine was inconsistent with any practicable form of Imperial Organization, at least any form which Parliament would sanction.

IV

AMERICAN IDEALS AS EXPRESSED IN THE FOREIGN RELATIONS OF THE UNITED STATES

I. The ideal of non-intervention:

- A. This ideal was conceived in the minds of our early statesmen as a definite principle of their political philosophy, and is identical with the domestic ideal of individual rights.
- B. The warnings of George Washington and John Adams against the alliances, real and imaginary balances of power, and the political manoeuvrings of Europe.
- C. The Monroe doctrine, proclaimed in 1823, extended the ideal of non-intervention to the states of the New World, and was, in effect, a statement to the world that our government would not tolerate the intervention by Europe in the affairs of the independent states of America either to introduce foreign systems of government or to interfere in their internal concerns.
- D. A corollary of the non-intervention ideal, commonly known as the non-colonization principle, forbids further acquisitions of territory in the Americas by the powers of Europe.
- E. The original form of the Monroe doctrine has been substantially modified, but it remains today our most distinctive foreign policy.

II. The ideal of neutrality:

- A. This ideal, based upon an advanced conception of neutral duty, grew out of our determination to announce and fol-

low a policy of fair neutrality during the wars of the French revolution, when sympathy for France encouraged unneutral conduct as regards Great Britain and participation in the war as an ally of France under the treaty of alliance of 1778.

- B. Proclamations of neutrality and so-called neutrality laws forbid unneutral conduct against a state with which the United States is at peace. These laws have embodied the most liberal and enlightened interpretation of neutral duty.
- C. Notable instances of rigid adherence to the ideal of neutrality are the wars of the French revolution and the Napoleonic wars, the struggle between Spain and her American colonies, and the earlier years of the Great War.
- D. The United States has demanded respect for its neutral rights, even at the point of war. At the Washington Conference for the limitation of naval armament, the submarine, at the suggestion of an American delegate (Mr. Root) was outlawed as an instrument of naval warfare, except as the rules which apply to cruisers are adopted by submarines.

III. The ideal of *de facto* recognition:

- A. This ideal was dictated by a profound sympathy with new states attempting to break away from the old order of things and to set up new institutions based on liberal constitutions and international good-will.
- B. Under this ideal the United States will recognize a *de facto* or actual state or government as the *de jure* or legal one.
- C. This principle was first asserted in opposition to the principle of legitimacy, championed by the nations constituting the Holy Alliance, which would recognize only such nations and governments as respected royal rights of succession, and would suppress such governments as were founded on revolution and liberal principles.
- D. We have observed this principle in the recognition of the Latin American republics, and in the recognition of the liberal governments of Europe, especially France.
- E. Certain departures from this ideal have been made in the cases of Panama, Mexico, and Cuba, and it is asserted that we have violated this principle as regards Soviet Russia.

IV. The ideal of the legal equality of states:

- A. Chief Justice Marshall, in the case of the *Antelope*, declared that no principle of law was more firmly established than the perfect equality of nations, and that Russia and Geneva have equal rights.
- B. Of the many examples of the observances of this ideal, Cuba is the outstanding case. Here we intervened to terminate an intolerable situation, and renounced our rights to Cuba under title by conquest by erecting Cuba into an independent state, whose international existence we guarantee under a treaty mutually satisfactory to ourselves and to Cuba.
- C. This ideal refers to equality before the law, as there can be no such thing as equality of resources, power, or influence.

V. The ideal of Pan-Americanism:

- A. This is a community of sentiment existing between the states of the new world having for its purpose closer cooperation culturally, commercially, and to a more limited extent, politically.
- B. This ideal is institutionalized in the Pan-American conferences the last of which was held at Santiago de Chile in 1923, and in a semi-official organization called the Pan-American Union.
- C. It is also institutionalized in certain commercial, scientific, and educational conferences.
- D. An attempt has been made to establish a distinctively American system of public law.

VI. The ideal of international arbitration:

- A. It has been the consistent policy of the United States to submit to arbitration disputes with foreign powers which do not involve questions of national honor and which lend themselves to settlement by judicial process.
- B. The United States is a party to the Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes.
- C. We have many treaties of arbitration with states, independent of any international tribunal.
- D. Both the Democratic and Republican parties are committed to American adhesion to the Permanent Court of International Justice, established under the authority of the League of Nations.

VII. The ideal of the "Open Door":

- A. This ideal, meaning equality of commercial opportunity, was first urged by John Hay against the nations threatening the dismemberment of China.
- B. The conventions concerning China concluded at the recent conference on the Limitation of Armament and Far Eastern Affairs definitely guarantee to China and the rest of the world that commercial arrangements and transactions will be on the basis of equality.
- C. At the conference on Near-Eastern Affairs at Lausanne, the unofficial American delegate urged the application of an "open door" policy to the territory and waters in and about the Straits, and to Turkish territories generally, especially those under mandate to foreign powers. The recent Turkish treaty embodies this ideal.

VIII. The ideal of world peace:

- A. The United States was for a long time neither a colonizing nor a sea power, and therefore has lacked the two sources of international strife and misunderstanding, namely, a desire to control the backward peoples of the world and their territories, and a desire to control the seas.
- B. The American people are impatient with large standing armies. The army of the United States has, in time of peace, been limited to a nominal strength.
- C. The United States has at different times proposed the limitation of naval armament by positive agreement between the naval powers. The treaties of the Washington conference embody the ideal inspired by the American government.
- D. With the President as commander in chief of our military forces, and with the power to declare war lodged in the Congress, the makers of the Constitution fixed for all time the control of the military departments by the civil authorities.
- E. Mr. Roosevelt led in movements toward peace, notably in Central America, in the Russo-Japanese war, and at the second Hague Conference.
- F. The Bryan treaties provide a waiting period of one year, during which the signatory powers engage to resort to measures short of war in the settlement of any dispute.

- G. American participation in the League of Nations, a league to keep the peace of the world, was frustrated by a conflict over questions of constitutional rights and sovereignty.
- H. The policy of the United States today is to support movements toward peace through independent action, and to deal with the situation as it may arise, without pledging action in advance of the contingency.

IX. The ideal of democracy in foreign relations:

- A. Under our constitution the control of foreign relations was removed from the people and the popular branch of the legislature, and lodged in the President and Senate.
- B. It is a tradition to demand an accounting in regard to domestic questions, but to reserve judgment on questions of foreign policy.
- C. There is an increasing agitation for a more democratic method of declaring war, in order that the people may not be led into unnecessary and undesirable conflicts.
- D. Treaty negotiation, formerly regarded as a secret proceeding, has lost this quality due to the demand of the people to be informed at all stages of the proceedings.
- E. The conflicts between the President and Senate over the control of foreign relations has led to the demand for a more direct and democratic control of the nation's foreign affairs.
- F. The liberal clauses of the Treaty of Versailles were inspired by the American delegation, notably the mandate system, the covenant of the League of Nations, provisions protecting religious, linguistic and racial minorities and small states, and the clauses dealing with labor.
- G. The war messages of President Wilson inspired a demand for democratic institutions throughout the world, and for the abandonment of the old diplomacy.
- H. Questions of foreign policy are today regarded as important as domestic questions by the people and the political parties.

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PART II

THE MAYFLOWER COMPACT

In y^e name of God Amen. We whose names are underwritten, the loyall subjects of our dread Sovereigne Lord King James by y^e grace of God, of great Britaine, Franc, & Ireland king, defender of y^e faith, &c.

Haveing undertaken, for y^e glorie of God, and advancemente of y^e christian faith and honour of our king & countrie, a voyage to plant y^e first colonie in y^e Northene parts of Virginia. Doe by these presents solemnly & mutually in y^e presence of God, and one of another, covenant, & combine our selves together into a Civill body politick; for our better ordering, and preservation & furtherance of y^e ends aforesaid; and by Vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, Acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for y^e generall good of y^e Colonie: unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap-Codd y^e .ii. of November, in y^e year of y^e raigne of our soveraigne Lord King James of England, France, & Ireland y^e eighteenth and of Scotland y^e fiftie fourth. An^o: Dom. 1620.

PART III

THE BILL OF RIGHTS

An Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown—1689

Whereas, the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the Estates of the people of this Realm, did upon the 13th day of February, in the year of our Lord One Thousand Six Hundred and Eighty-eight (o. s.), present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following, viz.:

“Whereas the late King James II, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate the Protestant religion, and the laws and liberties of this Kingdom;

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy Prelates for humbly petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown by pretense of prerogative for other time and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law:

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench for matters and causes cognisable only in Parliament, and by divers other arbitrary and illegal causes.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned, and served on juries and trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the late King James II having abdicated the government, and the throne being thereby vacant, His Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this Kingdom from Popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, borroughs, and cinque ports, for the choosing of such persons to represent them as were of right to be sent to Parliament, to meet and sit at Westminster upon the two and twentieth day of January, in this Year One Thousand Six Hundred Eighty and Eight, in order to such an establishment as that their religion, laws, and liberties might not again be in danger of being subverted; upon which letters elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating, and asserting their ancient rights and liberties, declare:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing of laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown by pretence and prerogative without grant of Parliament, for longer time or in other manner than the same is or shall be granted is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law.

7. That the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law.

8. That election of members of Parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted.

11. That jurors ought to be duly impanelled and returned, and juries which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of His Highness the Prince of Orange, as being the only means for obtaining full redress and remedy therein.

Having therefore entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France and Ireland, and the dominions thereunto belonging, to hold the crown and

the royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said crown and royal dignity, of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken of all persons of whom the oaths of allegiance and supremacy might be required by law instead of them; and that the said oath of allegiance and supremacy be abrogated.

'I, A. B., do sincerely promise and swear. That I will be faithful and bear true allegiance to their Majesties King William and Queen Mary: 'So help me God.'

'I, A. B., do swear, That I do from my heart abhor, detest and abjure as impious and heretical that damnable doctrine and position, that princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, preeminence, or authority, ecclesiastical or spiritual, within this realm:

'So help me God.'"

IV. Upon which their said Majesties did accept the crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, that the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premises, the said Lords Spiritual and Temporal, and Commons, in Parliament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of Parliament, do pray that it may be declared

and enacted. That all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts, think, and do hereby recognise, acknowledge, and declare, that King James II having abdicated the Government, and their Majesties having accepted the Crown and royal dignity as aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our sovereign liege Lord and Lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging; in and to whose princely persons the royal estate, crown, and dignity of the said realms, with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining, are most fully, rightfully, and entirely invested and incorporated, united, and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the Crown and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spiritual and Temporal, and Commons, do beseech their Majesties that it may be enacted, established, and declared, that the Crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them. And that the entire, perfect, and full exercise of the regal power and government be only in, and executed by, his Majesty, in the names of both their Majesties, during their joint lives; and after their deceases the said Crown and premises shall be and remain to the heirs of the Body of her Majesty; and for default of such issue, to her Royal Highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty; and thereunto the said Lords Spiritual and Temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and

posterities, for ever: and do faithfully promise, that they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the Crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish prince, or by any king or queen marrying a Papist, the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the Crown and Government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise, any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance, and the said Crown and government shall from time to time descend to, and be enjoyed by, such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying, as aforesaid, were naturally dead.

X. And that every King and Queen of this realm, who at any time hereafter shall come to and succeed in the Imperial Crown of this kingdom, shall, on the first day of the meeting of the first Parliament, next after his or her coming to the Crown, sitting in his or her throne in the House of Peers, in the Presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen), make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirteenth year of the reign of King Charles II., intituled "An Act for the more effectual preserving the King's person and Government, by disabling Papists from sitting in either House of Parliament." But if it shall happen that such King or Queen, upon his or her succession to the Crown of this realm, shall be under the age of twelve years, then every such King or Queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of meeting of the first Parliament as aforesaid, which shall first happen after such King or Queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present Parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and

consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same, declared, enacted, or established accordingly.

XII. And be it further declared and enacted by the authority aforesaid. That from and after this present session of Parliament, no dispensation by non obstante of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament.

XIII. Provided that no charter, or grant, or pardon, granted before the three-and-twentieth day of October, in the year of our Lord One thousand six hundred eighty-nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this Act had never been made.

PART IV

THE DECLARATION OF INDEPENDENCE

In Congress, July 4, 1776

A DECLARATION BY THE REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measure.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the meantime, exposed to all the dangers of invasions from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for the naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitutions, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses ;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies ;

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government ;

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burned our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy of the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrection among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms ; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in our attention to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity ; and we have conjured them, by the ties of common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the

World for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, That these united Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And, for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

The foregoing Declaration was, by order of Congress, engrossed, and signed by the following members:

JOHN HANCOCK

NEW HAMPSHIRE

JOSIAH BARTLETT
WILLIAM WHIPPLE
MATTHEW THORNTON

RHODE ISLAND

STEPHEN HOPKINS
WILLIAM ELLERY

CONNECTICUT

ROGER SHERMAN
SAMUEL HUNTINGTON
WILLIAM WILLIAMS
OLIVER WOLCOTT

NEW YORK

WILLIAM FLOYD
PHILIP LIVINGSTON
FRANCIS LEWIS
LEWIS MORRIS

NEW JERSEY

RICHARD STOCKTON
JOHN WITHERSPOON
FRANCIS HOPKINSON
JOHN HART
ABRAHAM CLARK

MASSACHUSETTS BAY

SAMUEL ADAMS
JOHN ADAMS
ROBERT TREAT PAINE
ELBRIDGE GERRY

DELAWARE

CÆSAR RODNEY
GEORGE READ
THOMAS M'KEAN

MARYLAND

SAMUEL CHASE
WILLIAM PACA
THOMAS STONE
CHARLES CARROLL, of Carrollton

VIRGINIA

GEORGE WYTHE
RICHARD HENRY LEE
THOMAS JEFFERSON
BENJAMIN HARRISON
THOMAS NELSON, JR.
FRANCIS LIGHTFOOT LEE
CARTER BRAXTON

NORTH CAROLINA

WILLIAM HOOPER
JOSEPH HEWES
JOHN PENN

PENNSYLVANIA

ROBERT MORRIS
BENJAMIN RUSH
BENJAMIN FRANKLIN
JOHN MORTON
GEORGE CLYMER
JAMES SMITH
GEORGE TAYLOR
JAMES WILSON
GEORGE ROSS

SOUTH CAROLINA

EDWARD RUTLEDGE
THOMAS HAYWARD, JR.
THOMAS LYNCH, JR.
ARTHUR MIDDLETON

GEORGIA

BUTTON GWINNETT
LYMAN HALL
GEORGE WALTON

Resolved, That copies of the Declaration be sent to the several assemblies, conventions, and committees, or councils of safety, and to the several commanding officers of the continental troops; that it be proclaimed in each of the United States, at the head of the army.

PART V

ARTICLES OF CONFEDERATION

To all to whom these presents shall come, we the undersigned Delegates of the States affixed to our names, send greeting:

WHEREAS, The Delegates of the United States of America, in Congress assembled, did, on the 15th day of November, in the year of our Lord 1777, and in the second year of the Independence of America, agree to certain Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz.:

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA.

ARTICLE I. The style of this Confederacy shall be "The United States of America."

ART. II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

ART. III. The said States hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

ART. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the

same duties, impositions and restrictions as the inhabitants thereof respectively; *provided*, that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; *provided also*, that no imposition, duties or restriction shall be laid by any State on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ART. V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the Legislature of each State shall direct, to meet in Congress, on the first Monday in November in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ART. VI. No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any King, Prince, or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any King, Prince, or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any King, Prince, or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and have constantly ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted. Nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the Kingdom or State, and the subjects thereof, against which war has been so declared; and under such regulations as shall be established by the United States, in Congress assembled; unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ART. VII. When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the Legislature of each State, respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ART. VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of the common treasury, which shall be supplied by the several States, in proportion

to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

ART. IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances; *provided*, that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; *provided*, that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise, between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall

agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall, nevertheless, proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the Acts of Congress for the security of the parties concerned; *provided*, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the Judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward"; *provided*, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before described for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade, and managing all affairs with the Indians, not members of any of the States; *provided*, that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating postoffices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated

a "Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; *provided*, that no person be allowed to serve in the office of President more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled. But if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the Legislature of such State shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space

of six months; and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ART. X. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; *provided*, that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ART. XI. Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ART. XII. All bills of credit emitted, moneys borrowed and debts contracted, by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII. Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

AND WHEREAS, It hath pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained.

And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the articles thereof shall by inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof, we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the 9th day of July, in the year of our Lord, 1778, and in the 3d year of the Independence of America.

JOSIAH BARTLETT,	JOHN WENTWORTH, JR., Aug. 8, 1778.	} On the part and behalf of the State of New Hampshire.
JOHN HANCOCK, SAMUEL ADAMS, ELBRIDGE GERRY,	FRANCIS DANA, JAMES LOVELL, SAMUEL HOLTON,	} On the part and behalf of the State of Massa- chus'ts Bay.
WILLIAM ELLERY, HENRY MARCHANT,	JOHN COLLINS,	} On the part and behalf of the State of Rhode Island and Providence Plantations.
ROGER SHERMAN, SAMUEL HUNTINGTON, OLIVER WOLCOTT,	TITUS HOSMER, ANDREW ADAM,	} On the part and behalf of the State of Con- necticut.
JAMES DUANE, FRANCIS LEWIS,	WILLIAM DUER, GOUVERNEUR MORRIS,	} On the part and behalf of the State of New York.
JOHN WITHERSPOON,	NATHANIEL SCUDDER,	} On the part and behalf of the State of New Jersey, November 26, 1778.
ROBERT MORRIS, DANIEL ROBERDEAU, J. BAYARD SMITH,	WILLIAM CLINGAN, JOSEPH REED, July 22, 1778.	} On the part and behalf of the State of Penn- sylvania.
THOMAS MCKEAN, Feb. 12, 1779. NICHOLAS VAN DYKE,	JOHN DICKINSON, May 5, 1779.	} On the part and behalf of the State of Dela- ware.
JOHN HANSON, March 1, 1781.	DANIEL CARROLL, March 1, 1781.	} On the part and behalf of the State of Mary- land.
RICHARD HENRY LEE, JOHN BANISTER, THOMAS ADAMS,	JOHN HARVIE, F. LIGHTFOOT LEE,	} On the part and behalf of the State of Vir- ginia.

JOHN PENN, July 21, 1778.	CORNELIUS HARNETT, JOHN WILLIAMS,	}	On the part and behalf of the State of North Carolina.
HENRY LAURENS, WM. HENRY DRAYTON, JOHN MATTHEWS,	RICHARD HUTSON, THOS. HEYWARD, JR.,		
JOHN WALTON, July 24, 1778.	EDWARD TELFAIR, EDWARD LONGWORTHY,	}	On the part and behalf of the State of Geor- gia.

The Articles of Confederation were ratified by the States as follows :

South Carolina	February 5, 1778	Massachusetts	March 10, 1778
New York	February 6, 1778	North Carolina	April 5, 1778
Rhode Island	February 9, 1778	New Jersey	November 19, 1778
Connecticut	February 12, 1778	Virginia	December 15, 1778
Georgia	February 26, 1778	Delaware	February 1, 1779
New Hampshire	March 4, 1778	Maryland	January 30, 1781
Pennsylvania	March 6, 1778		

The ratification by all the States was formally announced to the public
March 1, 1781.

PART VI

THE VIRGINIA PLAN

1. Resolved that the articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, "common defense, security of liberty and general welfare."

2. Resolved therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Resolved that the National Legislature ought to consist of two branches.

4. Resolved that the members of the first branch of the National Legislature ought to be elected by the people of the several States every
for the term of ; to be of the age of
years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of
after its expiration; to be incapable of reelection for the space of
after the expiration of their term of service, and to be subject to recall.

5. Resolved that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of years at least; to hold their offices for a term sufficient to ensure their independency, to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted

by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

7. Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of _____ years, to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National Laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, and every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by _____ of the members of each branch.

9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution, that the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

10. Resolved that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government and Territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

11. Resolved that a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government and territory, ought to be guaranteed by the United States to each State.

12. Resolved that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

14. Resolved that the Legislative Executive and Judiciary powers within the several States ought to be bound by oath to support the articles of Union.

15. Resolved that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider and decide thereon.

PART VII

THE NEW JERSEY PLAN

1. Resolved that the articles of Confederation ought to be so revised, corrected and enlarged, as to render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.

2. Resolved that in addition to the powers vested in the United States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the United States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-Office, to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time, to alter and amend in such manner as they shall think proper; to pass Acts for the regulation of trade and commerce as well with foreign nations as with each other; provided that all punishments, fines, forfeitures and penalties to be incurred for contravening such acts, rules and regulations shall be adjudged by the Common law Judiciarys of the State in which any offense contrary to the true intent and meaning of such Acts, rules and regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior Common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law and fact in rendering judgment, to an appeal to the Judiciary of the United States.

3. Resolved that whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non complying States and for that purpose to devise and pass acts directing and authorizing the same; provided that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least States, and in that proportion if the number of Confederated States should hereafter be increased or diminished.

4. Resolved that the United States in Congress be authorized to elect a federal Executive to consist of _____ persons, to continue in office for the term of _____ years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for _____ years thereafter; to be ineligible a second time, and removable by Congress on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.

5. Resolved that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive, and to hold their offices during good behaviour, to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the Judiciary so established shall have authority to hear and determine in the first instance on all impeachments of federal officers, and by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies and felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue; that none of the Judiciary shall during the time they remain in Office be capable of receiving or holding any other office or appointment during their time of service, or for _____ thereafter.

6. Resolved that all Acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the articles of confederation vested in them, and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent the carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth the power of the Confederate States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.

7. Resolved that provision be made for the admission of new States into the Union.

8. Resolved the rule for naturalization ought to be the same in every State.

9. Resolved that a Citizen of one State committing an offense in another State of the Union, shall be deemed guilty of the same offense as if it had been committed by a Citizen of the State in which the offense was committed.

PART VIII

BRIEF BIOGRAPHICAL NOTES ON THE MEMBERS OF THE CONSTITUTIONAL CONVENTION¹

ABRAHAM BALDWIN, Ga., 1754-1807. Minister; Graduate of Yale, 1772; Chaplain in the Revolutionary Army; Member of the State Legislature, 1784; Member of the Confederation Congress, 1786-1788; U. S. Congressman, 1789-1799; United States Senator, 1799-1807.

RICHARD BASSETT, Del., (d. 1815) Lawyer; United States Senator, 1789-1793; Chief Justice of the Court of Common Pleas of the State of Delaware, 1793-1798; Governor of Delaware, 1799-1801; 1801—*midnight* appointee of Adams as United States Circuit Judge.

GUNNING, BEDFORD, Del., 1747-1812. Lawyer; Aide-de-Camp to Washington; Delegate to the Confederation Congress 1783-1786; Attorney-General of Delaware; United States District Judge for Delaware.

JOHN BLAIR, Va., 1732-1800. Lawyer; Judge of the Va. Court of Appeals, 1777-1780; Judge of the Va. High Court of Chancery; Associate Justice in the United States Supreme Court, 1789-1796.

WILLIAM BLOUNT, N. C., 1749-1800. Land speculator; Member of the North Carolina Legislature; Member of the Confederation Congress, 1783-1784; Governor of the Territory of the United States south of the Ohio, 1790-1796; United States Senator from Tennessee, 1796-1798; State Senator in Tennessee, 1798-1800.

DAVID BREARLEY, N. J., 1745-1790. Lawyer; Member of the army of the Revolution; Chief Justice of New Jersey, 1779-1789; United States District Judge, 1789-1790.

JACOB BROOM, Del. Owner of stock in Cotton Mills and in the Insurance Company of North America; Postmaster at Wilmington, Del.

PIERCE, BUTLER, S. C., 1744-1822. Slaveholder; Delegate to the Confederation Congress, 1787; Stockholder and Director of the First United States Bank; United States Senator from South Carolina, 1789-1796 and 1802-1804.

¹Adapted by permission from Lowrey, *American Constitutional History and Ideals*. Other facts may be found in the following books: Elliott, *Biographical Story of the Constitution*; Farrand, *Framing of the Constitution*; Beard, *Economic Interpretation of the Constitution*.

DANIEL CARROLL, Md. Owner of the present site of Washington, D. C.; United States Congressman, 1789-1791; Commissioner for the laying out of the District of Columbia.

GEORGE CLYMER, Pa., 1739-1813. Merchant; 1775, Continental Treasurer; Member of the Continental Congress, 1776, 1777, 1780; Signer of the Declaration of Independence; Congressman, 1789-1791; Collector of Internal Revenue, 1791-1793.

WILLIAM R. DAVIE, N. C., 1756-1820. Lawyer; Commissary General of the Southern Army; Ambassador to France, 1799; Special Commissioner to negotiate with the Tuscaroras.

JONATHAN DAYTON, N. J., 1760-1824. Land speculator; Member of the Revolutionary Army; Member and Speaker of the State Legislature; Congressman, 1791-1799; Speaker of the House of Representatives, 1795-1799; United States Senator, 1799-1805.

JOHN DICKINSON, Del., 1732-1808. Lawyer; Member of the Stamp Act Congress; Member of the First Continental Congress; Member of the Revolutionary Army; President of Delaware, 1781; President of Pennsylvania, 1782-1785.

OLIVER ELLSWORTH, Conn., 1745-1807. Lawyer; Delegate to the Confederation Congress; Member of the Governor's Council, 1784; Judge of the Conn. Supreme Court, 1784-1787; United States Senator, 1789-1796; Chief Justice Supreme Court of the U. S., 1796-1799; Envoy Extraordinary to France, 1799.

WILLIAM FEW, Ga. Lawyer and farmer; worth about \$100,000; United States Senator, 1789-1793; Commissioner of Loans, 1802-1810; moved to New York State in 1799; Member of the New York Legislature, 1802-1805.

THOMAS FITZSIMMONS, Pa. Merchant; Director of the Bank of North America; Congressman, 1789-1795.

BENJAMIN FRANKLIN, Pa., 1706-1790. Statesman; known all over the world as a scientist and philosopher; 1753, Deputy Postmaster General of the British Colonies; Member of the Albany Congress, 1754; Agent for Pennsylvania in London, England, 1757-1762 and from 1764 to the Revolution; Signer of the Declaration of Independence; Minister or Commissioner from the United States to France, 1776-1785; Negotiated and signed treaty of peace with Great Britain, 1782-1783; President of Pennsylvania, 1785-1787; Philanthropist.

ELBRIDGE GERRY, Mass., 1744-1814. Merchant; Member Mass. Colonial House of Representatives 1772-1775; Delegate to the Continental and Confederate Congresses, 1776-1780 and 1783-1785; Signer of the Declaration of Independence; Congressman, 1789-1793; Special Com-

missioner to France, 1797; Governor of Massachusetts, 1810 and 1811; Vice-President of the U. S., 1813-14; believed that the United States had too much democracy.

NICHOLAS GILMAN, N. H., 1755-1814. Public Serviceman; Adjutant General during the Revolution; Delegate to Confederation Congress, 1786-88; Congressman, 1789-1797; United States Senator, 1805-1814.

NATHANIEL GORHAM, Mass. Merchant and land speculator; owned \$1,000,000 worth of western lands; owned twenty shares of stock in the First United States Bank; opposed to any property qualifications for voting.

ALEXANDER HAMILTON, N. Y., 1757-1804. Lawyer; most brilliant man in the convention; believed in aristocracy; member of Washington's staff; Member of Confederation Congress, 1782-1783; author of the *Federalist*; Secretary of the Treasury, 1789-1795; Inspector General of the U. S. Army, 1798.

WILLIAM C. HOUSTON, N. J. Professor; Clerk of the Supreme Court of New Jersey; believed in democracy; took little part in the convention.

WILLIAM HOUSTON, Ga. Lawyer; Son of a royalist; supported the Constitution but failed to sign the document.

JARED INGERSOLL, Pa., 1749-1822. Lawyer; Member of Continental Congress, 1780-1781; Attorney General of Pennsylvania; U. S. District Attorney for Eastern Pennsylvania; defeated as Federalist candidate for Vice-President in 1812.

DANIEL of ST. THOMAS JENIFER, Md. Slaveholder. (d. 1790.)

WILLIAM S. JOHNSON, Conn., 1727-1819. Lawyer; Conn. delegate to the Stamp Act Congress; London agent of the Colony 1766-1771; Judge of the Conn. Supreme Court 1772-1774; conscientious objector during the Revolution; Member of the Confederation Congress, 1784-1787; United States Senator, 1789-1791; President of Columbia College, 1791-1800.

RUFUS KING, Mass., 1755-1827. Public Serviceman and business man; Member of Massachusetts Legislature; Delegate to Continental Congress; 1789-1796 United States Senator from New York; Minister to England, 1796-1803; Federalist candidate for Vice-President, 1804; Federalist candidate for Governor of New York, 1815; last Federalist candidate for the Presidency, 1816; United States Senator from New York, 1813-1825; Minister to England, 1825-1826.

JOHN LANGDON, N. H., 1741-1819. Merchant; Delegate to Continental Congress, 1775, 1776, 1783; member of the Revolutionary army,

gave his estate to the cause; United States Senator 1789-1801; Governor of New Hampshire 1805-1809, 1810, 1811.

JOHN LANSING, N. Y., 1754-1829. Lawyer; Delegate to the Congress of the Confederacy, 1784-1788; Mayor of Albany; Justice of the New York Supreme Court, 1790-1798; Chief Justice, 1798-1801; Chancellor, 1801-1814; failed to sign the Constitution.

WILLIAM LIVINGSTON, N. J., 1723-1790. Lawyer; Delegate to the Continental Congress, 1774-1776; Governor of New Jersey, 1776-1790.

JAMES McCLUNG, Va. Physician; had no use for state legislatures; director of the First Bank of the United States.

JAMES McHENRY, Md., 1753-1816. Capitalist; Surgeon; opposed to representative institutions; Surgeon in the Revolutionary War; State Senator 1781-1786; Delegate to the Congress of the Confederation 1783-1786; Secretary of War, 1796-1801.

JAMES MADISON, Va., 1751-1836. Lawyer; "THE FATHER OF THE CONSTITUTION"; a student of politics and political theory; *Notes* on the Convention; Member of the Virginia Convention of 1776; Member of the Continental Congress 1780-1784; Member of the Virginia Assembly, 1784-1787; Member of the Alexandria Conference and Annapolis Conference; helped Hamilton with the *Federalist*; Congressman, 1789-1797; Secretary of State, 1801-1809; President of the United States, 1809-1817.

ALEXANDER MARTIN, N. C. Slaveholder and lawyer; failed to sign the Constitution or to take part in discussion; elected Governor of North Carolina, 1792; United States Senator, 1793-1799.

LUTHER MARTIN, Md., 1744-1826. Lawyer; Attorney General of Maryland; Member of the Congress of the Confederation, 1784-1785; failed to sign the Constitution and fought its ratification.

GEORGE MASON, Va., 1725-1792. Slaveholder; Member of the Virginia Assembly; slavery opponent in the Convention; refused to sign the Constitution and fought its ratification; elected United States Senator in 1789 but refused to serve.

JOHN FRANCIS MERCER, Md., 1759-1821. Lawyer; fought in the Revolutionary army; Delegate in the Congress of the Confederation, 1782-1785; Congressman, 1791-1795; Governor of Maryland, 1801-1803; opposed to the popular election of national officers; refused to sign the Constitution.

THOMAS MIFFLIN, Pa., 1744-1800. Merchant; Member of the Pennsylvania Legislature; Delegate to the First Continental Congress; Quartermaster General of the Revolutionary army; Member of the

Board of War; President of the Congress of the Confederation, 1783; Governor of Pennsylvania, 1790-1799.

GOUVERNEUR MORRIS, Pa., 1752-1816. Lawyer; Member of New York Provincial Congress; Member of the Continental Congress; Assistant Superintendent of Finance during the Revolution; Commissioner to England, 1789-1792; Minister to France, 1792-1799; United States Senator, 1800-1803; distrusted democratic institutions.

ROBERT MORRIS, Pa., 1734-1806. Banker and land speculator; Signer of the Declaration of Independence; Financier of the Revolution-Superintendent of Finance; Organizer of the Bank of North America; 1789-1795, United States Senator; later imprisoned for debt.

WILLIAM PATERSON, N. J., 1745-1806. Lawyer; Delegate in the Continental Congress, 1780-1781; presented the New Jersey plan; 1789-1791, United States Senator; Governor, 1791-1793; Justice in the United States Supreme Court, 1793-1806.

WILLIAM PIERCE, Ga., 1740-1806. Merchant; served in the Revolutionary army; Delegate to the Congress of the Confederation, 1786-1787; refused to sign the Constitution.

CHARLES COTESWORTH PICKNEY, S. C., 1746-1825. Lawyer; Attorney General of the Colony of South Carolina; Major during the Revolution; had little confidence in popular government; Special Envoy in France in 1796, XYZ affair; Major General in the American Army, 1798; Candidate for Vice-President, 1800; Federalist candidate for President in 1804 and 1808.

CHARLES PINCKNEY, S. C., 1758-1824. Lawyer; member South Carolina Legislature, 1779-1780; Delegate to Continental Congress, 1777-1778, and to Congress of the Confederation, 1784-1787; introduced Pinckney plan in the Convention; Governor, 1789-1792 and 1796-1798, 1806-1808; United States Senator, 1797-1801; Minister to Spain, 1803-1805; Congressman, 1819-1821; advocated in Constitutional Convention that a property qualification of \$100,000 be set up for the President and \$50,000 for members of Supreme Court.

EDMUND RANDOLPH, Va., 1753-1813. Lawyer; Member of the Virginia Constitution Convention of 1776; Attorney General of the State; Delegate to the Continental Congress; member of the Annapolis Convention; Governor of Virginia, 1786-1788; introduced the Virginia plan; refused to sign the Constitution but defended it and worked for its ratification; Attorney General of the United States, 1789-1794; Secretary of State, 1794-1795.

GEORGE READ, Del., 1733-1798. Lawyer; Member of the Legislature; Attorney General; Signer of the Declaration of Independence; Member of the Continental Congress; Member of the Annapolis Con-

vention; United States Senator, 1789-1793; Chief Justice of Delaware, 1793-1798.

JOHN RUTLEDGE, S. C., 1739-1800. Lawyer; Member of the Stamp Act Congress; Member of the Continental Congresses; President of South Carolina, 1776; Governor of South Carolina, 1779-1782; Chancellor of the State of S. C., 1784; Chief Justice of S. C. Supreme Court, 1791-1795; Justice in U. S. Supreme Court, 1795.

ROGER SHERMAN, Conn., 1721-1793. Shoemaker; Lawyer; Member of the Legislature; Delegate to the Continental Congresses; Signer of the Declaration of Independence; Congressman, 1789-1791; United States Senator, 1791-1793.

RICHARD SPAIGHT, N. C., 1758-1802. Planter; Delegate to the Congress of the Confederation, 1782-1784; Governor, 1792; Congressman, 1798-1801.

CALEB STRONG, Mass., 1745-1819. Lawyer; Member of the Massachusetts Committee of Correspondence, 1774; Member of the General Court, 1776-1778; Member State Senate, 1780-1789; failed to sign the Constitution but favored its ratification; United States Senator, 1789-1796; Governor, 1800-1807 and 1812-1816.

GEORGE WASHINGTON, Va., 1732-1799. Planter; Major in Va. Colonial Army; General during the Revolution; President of the United States, 1789-1797; the richest man in the United States in his day, estimated by Professor Beard to be worth \$530,000.

HUGH WILLIAMSON, N. C., 1735-1819. Merchant and physician; Delegate to the Congress of the Confederation; author of the "History of North Carolina"; Congressman, 1789-1793; owned two truckloads of paper currency.

JAMES WILSON, Pa., 1742-1798. Lawyer; born and educated in Scotland; knew more common and international law than any other man in the Convention; Delegate in Continental Congress; Signer of the Declaration of Independence; Associate Justice of the U. S. Supreme Court, 1789-1798.

GEORGE WYTHE, Va., 1726-1806. Lawyer; Member of the Virginia House of Burgesses, 1754-1776; Delegate to Continental Congress; Signer of the Declaration of Independence; Judge of the High Court of Chancery, 1777-1786; Chancellor of the Court, 1786-1806; failed to sign the Constitution but favored its ratification.

ROBERT YATES, N. Y., 1738-1801. Lawyer; Member of the New York Provincial Congress, 1775-1778; refused to sign the Constitution and fought its ratification; Justice of the New York Supreme Court, 1776; Chief Justice, 1790-1798.

PART IX

LIST OF PERSONS NOMINATED AS CHIEF JUSTICE AND AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, 1789-1925¹

[The dates of final appointment and nomination to the Senate and the figures as to the votes are taken from the official *Executive Journals of the Senate*, until 1901. The dates after 1901, are from the *Congressional Record*. The order is as follows: date of birth; date of appointment or nomination (the date of receipt of nomination by the Senate, when differing from the date of appointment, being inserted in parentheses); date of confirmation by the Senate; date of rejection; date of final postponement of consideration; date of withdrawal of the nomination; date of declination of office after confirmation.]

John Jay (Chief Justice), born Dec. 12, 1745; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

John Rutledge, born, — — 1739; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789; resigned, March 5, 1791.

William Cushing, born, March 1, 1732; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

Robert Hanson Harrison, born, — — 1745; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

James Wilson, born, Sept. 14, 1742; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

John Blair, born, — — 1732; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

James Iredell, born, Oct. 5, 1751; appointed, Feb. 9, 1790; confirmed, Feb. 10, 1790.

Thomas Johnson, born, Nov. 4, 1732; appointed, Aug. 5, 1791, Oct. 31, 1791 (Nov. 1, 1791); confirmed, Nov. 7, 1791.

William Paterson, born — — 1745; appointed, Feb. 27, 1793; withdrawn, Feb. 28, 1793.

William Paterson, appointed, March 4, 1793; confirmed, March 4, 1793.

John Rutledge (Chief Justice), born, — — 1739; appointed, July 1, 1795 (Nov. 5, 1795); rejected, Dec. 15, 1795 (10-14).

William Cushing (Chief Justice), born, March 1, 1732; appointed, Jan. 26, 1796; confirmed, Jan. 27, 1796; declined, Feb. 2, 1796.

¹This list is taken mainly from Warren's *Supreme Court in United States History*, Vol. III, pp. 479-483.

- Samuel Chase, born, April 17, 1741; appointed, Jan. 26, 1796; confirmed, Jan. 27, 1796.
- Oliver Ellsworth (Chief Justice), born, April 29, 1745; appointed, March 3, 1796; confirmed, March 4, 1796 (21-1).
- Bushrod Washington, born, June 5, 1762; appointed, Sept. 29, 1798 (Dec. 19, 1798); confirmed, Dec. 20, 1798.
- Alfred Moore, born, May 21, 1755; appointed, Oct. 20, 1799 (Dec. 6, 1799); confirmed, Dec. 10, 1799.
- John Jay (Chief Justice), born, Dec. 12, 1745; appointed, Dec. 18, 1800; confirmed, Dec. 19, 1800; declined, Jan. 2, 1801.
- John Marshall (Chief Justice), born, Sept. 24, 1755; appointed, Jan. 20, 1801; confirmed, Jan. 27, 1801.
- William Johnson, born, Dec. 27, 1771; appointed, March 22, 1804; confirmed, March 24, 1804.
- Henry Brockholst Livingston, born, Nov. 26, 1757; appointed, Nov. 10, 1806, Dec. 13, 1806 (Dec. 15, 1806); confirmed, Dec. 17, 1807.
- Thomas Todd, born, Jan. 23, 1765; appointed, Feb. 28, 1807; confirmed, March 3, 1807.
- Levi Lincoln, born, May 15, 1749; appointed, Jan. 2, 1811; confirmed, Jan. 3, 1811.
- Alexander Wolcott, born, Nov. 12, 1775; appointed, Feb. 4, 1811; rejected, Feb. 13, 1811 (9-24).
- John Quincy Adams, born, July 11, 1767; appointed, Feb. 21, 1811; confirmed, Feb. 22, 1811; declined, April, 1811.
- Joseph Story, born, Sept. 18, 1779; appointed, Nov. 15, 1811; confirmed, Nov. 18, 1811.
- Gabriel Duval, born, Dec. 6, 1752; appointed, Nov. 15, 1811; confirmed, Nov. 18, 1811.
- Smith Thompson, born, Jan. 17, 1768; appointed, Sept. 11, 1823 (Dec. 8, 1823); confirmed, Dec. 19, 1823.
- Robert Trimble, born. — — 1777; appointed, April 11, 1826; confirmed, May 9, 1826 (27-5).
- John Jordan Crittenden, born, Sept. 10, 1787; appointed, Dec. 17, 1828 (Dec. 18, 1828); postponed, Feb. 12, 1829 (27-17).
- John McLean, born, March 11, 1785; appointed, March 6, 1829; confirmed, March 7, 1829.
- Henry Baldwin, born, Jan. 14, 1780; appointed, Jan. 4, 1830 (Jan. 5, 1830); confirmed, Jan. 6, 1830 (41-2).
- James Moore Wayne, born, — — 1790; appointed, Jan. 7, 1835; confirmed, Jan. 9, 1835.

- Roger Brooke Taney, born, March 17, 1777; appointed, Jan. 15, 1835; postponed, March 3, 1835 (24-21).
- Roger Brooke Taney (Chief Justice), born, March 17, 1777; appointed, Dec. 28, 1835; confirmed, March 15, 1836 (29-15).
- Philip Pendleton Barbour, born, May 25, 1783; appointed, Dec. 28, 1835; confirmed, March 15, 1836 (30-11).
- William Smith, born, — — 1762; appointed, March 3, 1837; confirmed, March 8, 1837; declined, March, 1837.
- John Catron, born, — — 1786; appointed, March 3, 1837; confirmed, March 8, 1837.
- John McKinley, born, May 1, 1780; appointed, April 22, 1837 (Sept. 18, 1837); confirmed, Sept. 25, 1837.
- Peter Vivian Daniel, born, April 24, 1784; appointed, Feb. 26, 1841 (Feb. 27, 1841); confirmed, March 2, 1841 (22-5).
- John Canfield Spencer, born, Jan. 8, 1788; appointed, Jan. 8, 1844 (Jan. 9, 1844); rejected, Jan. 31, 1844 (21-26).
- Reuben Hyde Walworth, born, Oct. 26, 1788; appointed, March 13, 1844; postponed, Jan. 15, 1844 (27-20); withdrawn, June 17, 1844.
- Edward King, born, Jan. 31, 1794; appointed, June 5, 1844; postponed, June 15, 1844 (29-18).
- Edward King, appointed, Dec. 4, 1844; postponed, Jan. 23, 1845; withdrawn, Feb. 7, 1845.
- Samuel Nelson, born, Nov. 10, 1792; appointed, Feb. 4, 1845 (Feb. 6, 1845); confirmed, Feb. 14, 1845.
- John Meredith Read, born, July 21, 1797; appointed, Feb. 7, 1845 (Feb. 8, 1845); not acted upon.
- George Washington Woodward, born, March 26, 1809; appointed, Dec. 23, 1845; rejected, Jan. 22, 1846 (20-29).
- Levi Woodbury, born, Dec. 22, 1789; appointed, Sept. 20, 1845 (Dec. 23, 1845); confirmed, Jan. 3, 1846.
- Robert Cooper Grier, born, March 5, 1794; appointed, Aug. 3, 1846; confirmed, Aug. 4, 1846.
- Benjamin Robbins Curtis, born, Nov. 4, 1809; appointed, Sept. 22, 1851 (Dec. 11, 1851); Dec. 29, 1851.
- Edward A. Bradford, born, Sept. 27, 1813; appointed, Aug. 16, 1852; not acted upon.
- George Edmund Badger, born, April 17, 1795; appointed, Jan. 10, 1853; postponed, Feb. 11, 1853 (26-25).
- William C. Micou, — — 1806; appointed, Feb. 24, 1853; not acted upon.

- John Archibald Campbell, born, June 24, 1811; appointed, March 21, 1853; confirmed, March 25, 1853.
- Nathan Clifford, born, Aug. 18, 1803; appointed, Dec. 9, 1857; confirmed, Jan. 12, 1858 (26-23).
- Jeremiah Sullivan Black, born, Jan. 10, 1810; appointed, Feb. 5, 1861 (Feb. 6, 1861); rejected, Feb. 21, 1861 (25-26).
- Noah Haynes Swayne, born, Dec. 7, 1804; appointed, Jan. 21, 1862 (Jan. 22, 1862); confirmed, Jan. 24, 1862 (38-1).
- Samuel Freeman Miller, born, April 7, 1816; appointed, July 16, 1862; confirmed, July 16, 1862.
- David Davis, born, March 9, 1815; appointed, Oct. 17, 1862 (Dec. 1, 1862); confirmed, Dec. 8, 1862.
- Stephen Johnson Field, born, Nov. 4, 1816; appointed, March 6, 1863 (March 7, 1863); confirmed, March 10, 1863.
- Salmon Portland Chase (Chief Justice), born, Jan. 13, 1808; appointed, Dec. 6, 1864; confirmed, Dec. 6, 1864.
- Henry Stanbery, born, Feb. 20, 1803; appointed, April 16, 1866; not acted upon.
- Ebenezer Rockwood Hoar, born, Feb. 21, 1816; appointed, Dec. 14 (Dec. 15), 1869; rejected, Feb. 3, 1870 (24-33).
- Edwin McMasters Stanton, born, Dec. 19, 1815; appointed, Dec. 20, 1869; confirmed, Dec. 20, 1869 (46-11).
- William Strong, born, March 6, 1808; appointed, Feb. 7, 1870 (Feb. 8, 1870); confirmed, Feb. 18, 1870.
- Joseph P. Bradley, born, March 14, 1813; appointed, Feb. 7, 1870 (Feb. 8, 1870); confirmed, March 21, 1870 (46-9).
- Ward Hunt, born, June 14, 1810; appointed, Dec. 3, 1872 (Dec. 6, 1872); confirmed, Dec. 11, 1872.
- George Henry Williams (Chief Justice), born, March 23, 1823; appointed, Dec. 1, 1873 (Dec. 2, 1873); withdrawn, Jan. 8, 1874.
- Caleb Cushing (Chief Justice), born, Jan. 17, 1800; appointed, Jan. 9, 1874; withdrawn, Jan. 13, 1874.
- Morrison Remick Waite (Chief Justice), born, Nov. 29, 1816; appointed, Jan. 19, 1874; confirmed, Jan. 21, 1874 (63-6).
- John Marshall Harlan, born, June 1, 1833; appointed, March 29, 1877 (Oct. 17, 1877); confirmed, Nov. 29, 1877.
- William Burnham Woods, born, Aug. 3, 1824; appointed, Dec. 15, 1880; confirmed, Dec. 21, 1880 (39-8).
- Stanley Matthews, born, July 21, 1824; appointed, Jan. 26, 1881; not acted upon.
- Stanley Matthews, appointed, March 14, 1881 (March 18, 1881); confirmed, May 12, 1881 (24-23).

- Horace Gray, born, March 24, 1828; appointed, Dec. 19, 1881; confirmed, Dec. 20, 1881 (51-5).
- Roscoe Conkling, born, Oct. 30, 1829; appointed, Feb. 24, 1882; confirmed, March 2, 1882 (39-12); declined, March, 1882.
- Samuel Blatchford, born, March 9, 1820; appointed, March 13, 1882; confirmed, March 27, 1882.
- Lucius Quintus Cincinnatus Lamar, born, Sept. 17, 1825; appointed, Dec. 6, 1887 (Dec. 12, 1887); confirmed, Jan. 16, 1888 (32-28).
- Melville Weston Fuller (Chief Justice); born, Feb. 11, 1833; appointed, April 30, 1888 (May 2, 1888); confirmed, July 20, 1888 (41-20).
- David Josiah Brewer, born, Jan. 20, 1837; appointed, Dec. 4, 1889; confirmed, Dec. 18, 1889 (53-11).
- Henry Billings Brown, born, March 21, 1836; appointed, Dec. 23, 1890; confirmed, Dec. 29, 1890.
- George Shiras, Jr., born, Jan. 26, 1832; appointed, July 19, 1892; confirmed, July 26, 1892.
- Howell Edmunds Jackson, born, April 8, 1832; appointed, Feb. 2, 1893; confirmed, Feb. 18, 1893.
- William Butler Hornblower, born, May 13, 1851; appointed, Sept. 19, 1893; rejected, Jan. 15, 1894 (24-30).
- Wheeler Hazard Peckham, born, Jan. 1, 1833; appointed, Jan. 22, 1894; rejected, Feb. 16, 1894 (32-41).
- Edward Douglass White, born, Nov. 3, 1845; appointed, Feb. 19, 1894; confirmed, Feb. 19, 1894.
- Rufus Wheeler Peckham, born, Nov. 8, 1838; appointed, Dec. 3, 1895; confirmed, Dec. 9, 1895.
- Joseph McKenna, born, Aug. 10, 1843; appointed, Dec. 16, 1897; confirmed, Jan. 21, 1898.
- Oliver Wendell Holmes, born, March 8, 1841; appointed, August 11, 1902 (Dec. 2, 1902); confirmed, Dec. 4, 1902.
- William Rufus Day, born, April 17, 1849; appointed, Feb. 19, 1903; confirmed, Feb. 23, 1903.
- William Henry Moody, born, Dec. 23, 1853; appointed, Dec. 3, 1906; confirmed, Dec. 12, 1906.
- Horace Harmon Lurton, born, Feb. 26, 1844; appointed, Dec. 13, 1909; confirmed, Dec. 20, 1909.
- Edward Douglass White (Chief Justice), born, Nov. 3, 1845; appointed, Dec. 12, 1910; confirmed, Dec. 12, 1910.
- Charles Evans Hughes, born, April 11, 1862; appointed, April 25, 1910; confirmed, May 2, 1910.
- Willis VanDevanter, born, April 17, 1859; appointed, Dec. 12, 1910; confirmed, Dec. 15, 1910.

- Joseph Rucker Lamar, born, Oct. 14, 1857; appointed, Dec. 12, 1910; confirmed, Dec. 15, 1910.
- Mahlon Pitney, born Feb. 5, 1858; appointed, Feb. 19, 1912; confirmed, March 13, 1912.
- James Clark McReynolds, born, Feb. 3, 1862; appointed, Aug. 19, 1914; confirmed, Aug. 29, 1914.
- Louis Dembitz Brandeis, born, Nov. 13, 1856; appointed, Jan. 28, 1916; confirmed, June 1, 1916.
- John Hessin Clarke, born, Sept. 15, 1857; appointed, July 14, 1916; confirmed, July 24, 1916.
- William Howard Taft (Chief Justice), born, Sept. 15, 1857; appointed, June 30, 1921; confirmed, June 30, 1921.
- George Sutherland, born, March 25, 1862; appointed, September 5, 1922; confirmed, September 5, 1922.
- Pierce Butler, born, March 17, 1866; appointed, November 23, 1922; confirmed, December 21, 1922.
- Edward Terry Sanford, born, July 25, 1865; appointed, January 24, 1923; confirmed, January 29, 1923.
- Harlan Fiske Stone, born, Oct. 11, 1872; appointed, January 5, 1925; confirmed, February 5, 1925.

PART X

ACTS OF CONGRESS DECLARED UNCONSTITUTIONAL BY THE SUPREME COURT¹

Act of September 24, 1789 (1 Stat. 80, sec. 13): This section authorized the Supreme Court to issue writs of *mandamus* "in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." In a suit for a *mandamus* to the Secretary of State, held, that the court had no jurisdiction, since the statute purporting to extend it to cases not named in the Constitution was unconstitutional. (See Art. III, sec. 2, cl. 2.)

Marbury v. Madison, 1 Cranch 137.

Acts of February 25, 1862 (12 Stat. 345), and March 3, 1863 (12 Stat. 709): Clause in legal tender acts making United States notes legal tender for all private and public debts held unconstitutional so far as it applied to debts contracted prior to passage of the act. (See Art. I, sec. 8, cl. 2.)

Hepburn v. Griswold, 8 Wall, 603.²

Act of March 3, 1863 (12 Stat. 765): Section 14 provided that judgments of the Court of Claims should be estimated for by the Secretary of the Treasury before being paid. Held, that this amounted to a denial of judicial power in the Court of Claims, hence the allowance of an appeal to the Supreme Court was unauthorized. (See Art. III, sec. 1.)

Gordon v. U. S., 2 Wall. 561; 117 U. S. 697.

Act of March 3, 1863 (12 Stat. 755, sec. 5): Statute provided for removal to United States circuit courts of cases brought in State courts against Federal officers for arrests, etc., made under authority of the President, the circuit court to try the facts and the law as though the case had been originally brought there. This case was removed after a trial by jury in the State court and a verdict for plaintiff. Held, that act was unconstitutional under the seventh amendment, which provides that "No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the common law."

Justices v. Murray, 9 Wall. 274.

¹These cases are taken in the main from *The Constitution of the United States* (annotated), compiled by George Gordon Payne.

²This decision was overruled in the Legal Tender Cases (12 Wall. 457).

Acts of June 30, 1864 (13 Stat. 281, sec. 116); March 3, 1865 (13 Stat. 479, sec. 1); July 13, 1866 (14 Stat. 137, sec. 9); March 2, 1867 (14 Stat. 477, sec. 13): Held, that these acts could not constitutionally be applied so as to tax the official salary of a judge of a State court. (See Art. I, sec. 8, cl. 1.)

Collector v. Day, 11 Wall. 113.

Act of June 30, 1864 (13 Stat. 284, sec. 112), amended July 13, 1866 (14 Stat. 138): The city of Baltimore had issued its bonds on behalf of the Baltimore & Ohio Railroad, taking a mortgage. Section 122, above, laid a tax of 5 per cent on the interest of bonds of railroads, etc. The Baltimore & Ohio refused to pay; held, that the tax was a tax on the creditor, and that it could not constitutionally be collected from the city of Baltimore, which was a part of the sovereign power of the state. (See Art. 1, sec. 8, cl. 1.)

U. S. v. Railroad Co., 17 Wall. 322.

Act of June 30, 1864 (13 Stat. 311): The act authorized transfer of prize causes from the circuit court to the Supreme Court. Held, that the Supreme Court had no jurisdiction under this act, its jurisdiction in prize cases being under the Constitution appellate only. (See Art. III, sec. 2, cl. 2.)

The *Alicia*, 7 Wall. 571.

Act of January 24, 1865 (13 Stat. 424): Act prohibited all persons from practice before the Federal courts without taking a specified test oath. Garland served in the Confederate Congress, but was pardoned by the President and admitted to the bar of the Supreme Court, the act being held unconstitutional as *ex post facto* and as an interference with the President's pardoning power. (See Art. I, sec. 9, cl. 3, and Art. II, sec. 2, cl. 1.)

Ex parte Garland, 4 Wall. 333.

Act of March 2, 1867 (14 Stat. 484): Statute made it a misdemeanor to sell oil for illuminating purposes inflammable at a temperature less than 110° Fahrenheit. Held unconstitutional as being merely a police regulation of trade within the State. (See Art. I, sec. 8, cl. 3.)

U. S. v. De Witt, 9 Wall. 41.

Act of May 31, 1870 (16 Stat. 140): Section 3 laid a penalty on State election officers, etc., for refusal to receive vote of "any citizen" who had duly offered to qualify as voter; and section 4 penalized the obstruction of "any citizen" from qualifying as a voter. Held, that not being limited to discrimination on account of race, color, or previous condition of servitude, this legislation was beyond the limit of the fifteenth amendment and was unauthorized.

U. S. v. Reese, 92 U. S. 214.

Act of July 12, 1870 (16 Stat. 235) : The act carrying appropriations for the payment of judgments of the Court of Claims contained a proviso that no pardon of the President, etc., should be admissible to establish the standing of any claimant or his right to bring suit, etc., under the abandoned and captured property acts. Held unconstitutional as an interference with the pardoning power of the President; and, further, since the party in question had received a judgment of the Court of Claims, affirmed by the Supreme Court, it was an interference with the judicial power. (See Art. II, sec. 2, cl. 1, and Art. III, sec. 1.)

U. S. v. Klein, 13 Wall. 128.

Revised Statutes, section 860:¹ Provided that no evidence obtained from a witness by means of a judicial proceeding should be used against him in any criminal proceedings, etc. Refusal to answer certain questions upheld and act declared invalid, in view of the fifth amendment, because not affording the witness absolute immunity against future prosecution for the offense to which the question related.

Counselman v. Hitchcock 142 U. S. 547.

Revised Statutes, sections 1977, 1978, 1979, 5508, and 5510 give the United States courts no jurisdiction of a charge of conspiracy made and carried out in a State to prevent citizens of African descent from making or carrying out contracts and agreements to labor. Held: Unless the thirteenth amendment vests jurisdiction in the National Government, the remedy for wrong committed by individuals in such cases is through State action and State tribunals.

Hodges v. U. S., 203 U. S. 1.

Revised Statutes, sections 4937-4947: These sections were trade-mark regulations which in terms applied to all commerce, while congressional authority is under the Constitution limited to interstate commerce. The act of August 14, 1876 (19 Stat. 141), approved in pursuance of the above legislation was also condemned as applied to State commerce. (See Art. I, sec. 8, cl. 3.)

Trade-mark Cases, 100 U. S. 82.

Revised Statutes, section 5132, subdivision 9,¹ made criminal the obtaining of goods under false pretenses by a person against whom within three months thereafter bankruptcy proceedings should be commenced, and the court held that that is a matter which concerned only the State in which the act was committed. (See Art. I, sec. 8, cl. 4.)

U. S. v. Fox, 95 U. S. 670.

Revised Statutes, section 5507,¹ made criminal the hindrance by individuals of the right of suffrage guaranteed by the fifteenth amendment.

¹Act has been expressly repealed.

Held, that the amendment applied only to action by the United States or the several States.

James v. Bowman, 190 U. S. 127.

Revised Statutes, section 5519: A statute penalizing conspiracy by individuals to deprive any person of the equal protection of the laws, being directed against private action, without reference to the laws of the State, is not authorized by the thirteenth, fourteenth, or fifteenth amendments or section 2 of Article IV of the Constitution.

U. S. v. Harris, 106 U. S. 629; *Baldwin v. Franks*, 120 U. S. 678.

Revised Statutes (D C.), section 1064; Statute dispensing with jury in prosecutions by information in the police court of the District of Columbia. Held unconstitutional as a basis for conviction and sentence by the police court on an information for conspiracy; the provision of the Constitution requiring jury in trial for crimes, being in force in the District of Columbia. (See Art. III, sec. 2, cl. 3.)

Callan v. Wilson, 127 U. S. 540.

Act of June 22, 1874 (18 Stat. 186): The act authorized the court, in civil proceedings under the revenue laws, to require the production of private papers, etc., in an information for forfeiture of certain goods. Held, that the act was unconstitutional as repugnant to the fourth amendment restricting unreasonable searches and seizures, and to the spirit of the fifth amendment, the proceedings being criminal in effect.

Boyd v. U. S., 116 U. S. 616.

Act of March 1, 1875 (18 Stat. 335, c. 114): Statute declared all persons entitled to equal enjoyment of facilities of inns, public conveyances, etc., and stated a penalty on persons violating this provision. Held, that fourteenth amendment applied to State action, and thirteenth amendment related only to slavery and involuntary servitude; hence no constitutional basis for the act.

Civil Rights Cases, 109 U. S. 3; *Butts v. Merchants Transp. Co.*, 230 U. S. 126.

Act of March 3, 1875 (18 Stat. 479):¹ Statute made a judgment against an embezzler of United States property "conclusive evidence" in a prosecution against a receiver of the stolen property. Held unconstitutional under the sixth amendment, which entitles an accused person to be confronted with the witnesses against him.

Kirby v. U. S., 174 U. S. 47.

¹Act has been expressly repealed.

Act of August 11, 1838 (25 Stat. 400, 411) : The power of Congress to regulate commerce among the States, granted by Art. I, sec. 8, cl. 3, is subject to the limitations imposed by the fifth amendment, requiring that just compensation be paid for private property taken for public uses, so that in condemning a certain lock and dam just compensation includes a payment for the franchise to take tolls.

Monongahela Nav. Co. v. U. S., 148 U. S. 312.

Act of May 5, 1892 (27 Stat. 25) : This act prescribed a term of imprisonment at hard labor for Chinese persons convicted of illegal residence in the United States. Held, that Wong Wing, though an alien, being within the territory of the United States, was entitled to the benefits of the fifth and sixth amendments; that is, to a judicial trial to establish his guilt. Under the act Chinese were given summary hearing before a justice or commissioner.

Wong Wing v. U. S., 163 U. S. 228.

Act of August 27, 1894 (28 Stat. 509) : The act laid taxes upon rents or income derived from real estate, or from the interest on municipal bonds. Held, that the tax on income from real estate was a direct tax within the meaning of section 9 of Article I of the Constitution, and that the tax on interest on municipal bonds was a tax on the power of the State, etc., to borrow money, and therefore repugnant to the Constitution.

Pollock v. Farmers', etc., Co., 157 U. S. 429; 158 U. S. 601.

Act of January 30, 1897 (29 Stat. 506) : Act made it unlawful to give or sell, etc., intoxicating liquors to any Indian to whom allotment of land had been made, while the title is held in trust by the Government, etc. Held, that an Indian, upon an allotment being made, becomes a citizen of the United States and no longer a ward of the Government, and that the district court had no jurisdiction, under this statute, to punish a sale of liquor to an allottee Indian. (See amend. 14.—"Citizenship.")

Matter of Heff, 197 U. S. 488.

Act of June 1, 1898 (30 Stat. 424) :¹ Act declared interstate carriers guilty of a misdemeanor who should threaten any employee with loss of employment because of his membership in labor organization. Held, that the power to regulate interstate commerce means power to prescribe rules governing such commerce having a substantial relation to the commerce regulated; that there was no such real connection in the present case. (See Art. I, sec. 8, cl. 3.)

Adair v. U. S., 208 U. S. 161.

¹Act has been expressly repealed.

Act of June 13, 1898 (30 Stat. 448):¹ Stamp tax on foreign bills of lading held in conflict with Article I, section 9, clause 5, of the Constitution, as in effect a duty on exports.

Fairbank v. U. S., 181 U. S. 283.

Act of June 13, 1898 (30 Stat. 448, 460):¹ The act laid a tax of \$3 to \$10 on the charter parties of "any ship or vessel or steamer." Held, that in so far as it related to the charter party of a vessel in foreign trade, it was invalid, being in substance a tax on exportation, and, as such, a tax on the exports.

U. S. v. Hvoslef, 237 U. S. 1.

Act of June 6, 1900 (31 Stat. 321, 358): Provision in the Alaska Code that in trial for a misdemeanor six persons should constitute a legal jury held unconstitutional, since from the treaty of acquisition and subsequent legislation it is apparent that Alaska has been incorporated into the United States and is therefore entitled to the benefit of the sixth amendment.

Rasmussen v. United States, 197 U. S. 516.

Act of March 3, 1901 (31 Stat. 1341): An appeal by the United States, in a prosecution for murder in which the defendant had been found not guilty, taken under section 935 of the District of Columbia Code, was dismissed, such an appeal being practically a moot case and a decision thereon not the exercise of judicial power. (See Art. III, sec. 2, cl. 2.)

U. S. v. Evans, 213 U. S. 297.

Act of June 11, 1906 (34 Stat. 232): The act made interstate carriers liable to their employees for injuries, etc., resulting from negligence of their officers, of insufficiency of roadbed, etc. Whole act held unconstitutional because expressed in general language which would cover cases occurring strictly within the limits of one State, as to which Congress had no power under the commerce clause. (Art. I, sec. 8, cl. 3.)

Employers' Liability Cases, 207 U. S. 463.

Act of February 20, 1907 (34 Stat. 898, sec. 3):¹ Statute made it felony to harbor an alien prostitute within three years of entry. An indictment against a person harboring such an alien, without knowledge of her alienage and not in connection with her entry, was quashed on ground that the jurisdiction of Congress over immigration does not extend to such an exercise of the police power. (See Amendment 14.)

Keller v. U. S., 213 U. S. 138.

¹Act has been expressly repealed.

Act of March 1, 1907 (34 Stat. 1015, 1028): Statute authorized certain Indians to bring suit in the Court of Claims to "determine the validity of any acts of Congress passed since the said act of July 1, 1902, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee Indians," etc. Petition brought under this act dismissed for want of jurisdiction, such a suit not being in the sense of the Constitution a "case or controversy," as specified in Article III, section 2.

Muskrat v. U. S., 219 U. S. 346.

Act of September 1, 1916 (39 Stat. 675): Act prohibited interstate transportation of goods made in factories employing child labor. Held unconstitutional as exceeding the commerce power of Congress, the necessary effect being a regulation of the hours of labor of children, a matter solely within State authority. (See Art. I, sec. 8, cl. 3, and Amendment 10.)

Hammer v. Dagenhart, 247 U. S. 251.

Act of October 6, 1917 (40 Stat. 395): The act amended the Judicial Code relating to admiralty jurisdiction by saving "to claimants the rights and remedies under the workmen's compensation law of any State," held unconstitutional as an attempt to delegate the legislative power of Congress under Article I, section 8, clause 18, and section 2, Article III, of the Constitution.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

Act of February 24, 1919 (40 Stat. 1062, sec. 213): Tax on the net income of a district judge by including his official salary in the computation diminishes that compensation, in violation of section 1, Article III, of the Constitution, and is invalid. (See also Amendment 16.)

Evans v. Gore, 253 U. S. 245.

Act of August 10, 1917 (40 Stat. 276, sec. 4; amended by act of October 22, 1919, 41 Stat. 297, sec. 2): The clause of the food control act penalizing sales, etc., of necessities "at unjust or unreasonable rate of charge" held unconstitutional because penalizing an action without setting up an ascertainable standard of guilt, and therefore repugnant to the fifth and sixth amendments, which require due process of law and that persons accused of crime shall be "informed of the nature and cause of the accusation," etc.

U. S. v. Cohen Grocery Co., 255 U. S. 81.

Weeds v. U. S., 255 U. S. 109.

Section 8 of the Federal corrupt practices act (June 25, 1910, 36 Stat. 822; amended August 19, 1911, 37 Stat. 25), which undertakes to limit

the amount of money which any candidate for the office of Representative in Congress or of United States Senator shall give, contribute, expend, use, or promise, or cause to be given, contributed, etc., in procuring his nomination or election held unconstitutional as applied to a primary election of candidates for a seat in the Senate. (See Art. I, sec. 4.)

Newberry v. U. S., 256 U. S. 232.

Act of February 24, 1919 (40 Stat 1138): Held tax on child-labor-made articles (title 12, revenue act of 1918) unconstitutional (Art I, sec. 8, cls. 1 and 3, and Amendment 10).

Baily v. Drexel Furn. Co., 259 U. S. 120.

Act of September 19, 1918 (40 Stat. 960), authorizing a board to fix wages for women and children in the District of Columbia, and providing punishment of fine and imprisonment for anyone paying a less wage than the fixed one, was held unconstitutional as a deprivation of one's liberty to contract without due process of law, under the fifth amendment.

Adkins v. Children's Hospital, 261 U. S. 525.

PART XI

LIST OF CASES IN WHICH THE SUPREME COURT HAS HELD ACTS OF CONGRESS UNCONSTITUTIONAL¹

Date	Cases	Acts of Congress	Statutes at Large
1793	U. S. v. Todd, 13 How. 40.	Mar. 23, 1792.	1 Stat. 243.
1803	Marbury v. Madison, 1 Cranch 137.	Sept. 24, 1789, §13.	1 Stat. 81.
1857	Scott v. Sanford, 19 How. 393.	Mar. 6, 1820, § 8.	3 Stat. 548.
1864	Gordon v. U. S., 2 Wall 561, 117 U. S. 697.	Mar. 3, 1863.	12 Stat. 766.
1866	Exparte Garland, 4 Wall 333.	Jan. 24, 1865.	13 Stat. 424.
1867	Reichart v. Felps, 6 Wall 160.	Feb. 20, 1812.	2 Stat. 677.
1868	The Alicia, 7 Wall 571.	June 30, 1864, §13.	13 Stat. 310.
1870	Hepburn v. Griswold, 8 Wall 603.	Legal Tender Acts, 1862-3.	12 Stat. 345, 532, 709.
1869	U. S. v. Dewitt, 9 Wall 41.	March 2, 1867, § 29.	14 Stat. 484.
1869	The Justices v. Murray, 9 Wall 274.	Mar. 3, 1863, § 5.	12 Stat. 756.
1870	Collector v. Day, 11 Wall 113.	Income Tax Acts, 1864-5-6-7.	13 Stat. 281, 479; 14 Stat. 137, 477.
1871	U. S. v. Klein, 13 Wall 128.	July 12, 1870.	16 Stat. 235.
1873	U. S. v. Railroad Co., 17 Wall 322.	June 30, 1864 (as amended, July 13, 1866).	14 Stat. 98, 138.

¹American Bar Association Journal, June 1924, p. 425.

Date	Cases	Acts of Congress	Statutes at Large
1875	U. S. v. Reese, 92 U. S. 214.	May 31, 1870.	16 Stat. 140.
1877	U. S. v. Fox, 95 U. S. 670.	Mar. 2, 1867.	14 Stat. 539; R. S. 5123 Sub. § 9.
1879	Trade Mark Cases, 100 U. S. 82.	July 8, 1870; Aug. 14, 1876.	16 Stat. 210, 211, 212; 19 Stat. 141; R. S. 4937-47.
1882	U. S. v. Harris, 106 U. S. 629.	April 20, 1871.	17 Stat. 13; R. S. 5519.
1883	Civil Rights Cases, 109 U. S. 3. (Cf. Butts v. Trans. Co., <i>infra</i> .)	Mar. 1, 1875, § 1-2.	18 Stat. 335.
1886	Boyd v. U. S., 116 U. S. 616.	June 22, 1874, § 5.	18 Stat. 187.
1887	Baldwin v. Franks, 120 U. S. 678.	Apr. 20, 1871.	17 Stat. 13; R. S. 5519.
1888	Callan v. Wilson, 127 U. S. 540.	June 25, 1868.	15 Stat. 76; R. S. Dist. Col. § 1064.
1892	Counselman v. Hitchcock, 142 U. S. 547.	Feb. 25, 1868.	15 Stat. 37; R. S. 860.
1893	Monongahela Nav. Co. v. U. S., 148 U. S. 312.	Aug. 11, 1888.	25 Stat. 411.
1895	Pollock v. Farmers Loan & Tr. Co., 157 U. S. 429, 158 U. S. 601.	Aug. 27, 1894, § 27-37.	28 Stat. 553.
1896	Wong Wing v. U. S., 163 U. S. 228.	May 5, 1892, § 5.	27 Stat. 25.
1899	Kirby v. U. S., 174 U. S. 47.	March 3, 1875.	18 Stat. 479.
1901	Fairbanks v. U. S., 181 U. S. 283.	June 13, 1898.	30 Stat. 459, 462.
1903	James v. Bowman, 190 U. S. 127.	May 31, 1870.	16 Stat. 141; R. S. 5507.

Date	Cases	Acts of Congress	Statutes at Large
1905	Matter of Heff, 197 U. S. 488.	Jan. 30, 1897.	29 Stat. 506
1905	Rasmussen v. U. S., 197 U. S. 516.	June 6, 1900, §171.	31 Stat. 358.
1906	Hodges v. U. S., 203 U. S. 1.	May 31, 1870; March 1, 1875.	16 Stat. 144; 18 Stat. 336; R. S. 1977.
1908	Employers' Liability Cases, 207 U. S. 463.	June 11, 1906.	34 Stat. 232.
1908	Adair v. U. S., 208 U. S. 161.	June 1, 1898.	30 Stat. 428.
1909	Keller v. U. S., 213 U. S. 138.	Feb. 20, 1907, §3.	34 Stat. 899.
1909	U. S. v. Evans, 213 U. S. 297.	March 3, 1901.	31 Stat. 1341; D. C. Code, §935.
1911	Muskrat v. U. S., 219 U. S. 346.	March 1, 1907.	34 Stat. 1028.
1911	Coyle v. Oklahoma, 221 U. S. 559.	June 16, 1906.	34 Stat. 269.
1913	Butts v. Merchants Trans'n Co., 230 U. S. 126.	March 1, 1875, §1-2.	18 Stat. 336.
1915	U. S. v. Hvoslef, 237 U. S. 1. ¹	June 13, 1898.	30 Stat. 460.
1918	Hammer v. Dagenhart, 247 U. S. 251.	Sept. 1, 1916.	39 Stat. 675-6.
1920	Eisner v. Macomber, 252 U. S. 189.	Sept. 8, 1916.	39 Stat. 757.
1920	Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.	Oct. 6, 1917.	40 Stat. 395.
1920	Evans v. Gore, 253 U. S. 245.	Feb. 24, 1919, § 213.	40 Stat. 1065.

¹See also *Thames & Mersey Marine Insurance Co. v. U. S.*, 237 U. S. 19.

Date	Cases	Acts of Congress	Statutes at Large
1921	U. S. v. Cohen Grocery Co., 255 U. S. 81.	Aug. 10, 1917, § 4; Oct. 22, 1919, § 2.	40 Stat. 276; 41 Stat. 297.
1921	Newberry v. U. S., 256 U. S. 232.	June 25, 1910; Aug. 19, 1911.	36 Stat. 822; 37 Stat. 25.
1922	U. S. v. Moreland, 258 U. S. 433.	March 23, 1906.	34 Stat. 86.
1922	Hill v. Wallace, 259 U. S. 44.	Aug. 24, 1921.	42 Stat. 187.
1922	Lipke v. Lederer, 259 U. S. 557.	Oct. 28, 1919.	41 Stat. 317.
1922	Child Labor Tax Case, 259 U. S. 20.	Feb. 24, 1919.	40 Stat. 1057, 1138.
1923	Adkins v. Children's Hos- pital, 261 U. S. 525.	Sept. 19, 1918.	40 Stat. 960.

PART XII

DECLARATIONS OF PARTIES AND CANDIDATES AS REGARDS THE SUPREME COURT AND THE CONSTITUTION DURING THE PRESIDENTIAL CAMPAIGN OF 1924.

PRESIDENT COOLIDGE¹

While we are discussing some of the problems of the day, some of the changes we propose to meet temporary conditions, it is also well to remember that it is equally necessary to support our fundamental institutions. We believe in our method of constitutional government and the integrity of the legislative, judicial, and executive departments. We believe that our liberties and our rights are best preserved, not through political, but through judicial action. The Constitution is the sole source and guaranty of national freedom. We believe that the safest place to declare and interpret the Constitution which the people have made is in the Supreme Court of the United States.

JOHN W. DAVIS

"These proposed amendments can have no other purpose than an entire change in our Constitutional system, for in attempting to destroy or limit the power of the Supreme Court to adjudicate upon the constitutionality of legislation we are giving up at one stroke not merely our belief in the separation of judicial and legislative powers but our reliance upon the Constitution as the supreme law of the land. . . . When all such proposals are reduced to their simplest terms they stand forth naked and undisguised as an attack on our theory of government under a written Constitution."

THE LA FOLLETTE PLATFORM

We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.

We favor such amendment to the Constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people

¹From President Coolidge's Address of Acceptance of his nomination for Presidency by the Republican Party on August 14, 1924.

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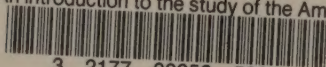
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